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Supreme Court, U.S.
FILED

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Case Number OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR JOHNSON,

Petitioner,

v.

ADOPTION CENTER OF CHOICE and
SEALED ADOPTIVE PARENTS

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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118 pp

QUESTIONS PRESENT FOR REVIEW

Does the Utah putative registry statute, which does not require the registry to be examined just prior to an adoption, adequately protect Petitioner's inchoate interest in establishing a relationship with his child? Lehr v. Robertson, 103 S.Ct. 2985, 463 U.S. 248, (U.S.N.Y. 1983)

Did the entry of an adoption decree in Utah deprive Petitioner of a constitutionally protected interest in due process of law? Lehr v. Robertson, Id.

May an appellate court refuse to decide an appeal on the very issues it has previously ordered a district court to decide regarding the subject matter of the case and involving issues of fundamental rights granted by the United States Constitution?

Under Utah law, was Petitioner, as a non-resident, precluded from seeking declaratory relief in federal court relating to the constitutionality of a state law where there are no "state actors" involved in the adoption of his child by a private adoption agency to a private party?

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner is a resident of the State of Arizona who is believed to have fathered the child at issue within the State of Arizona with another Arizona resident.

Respondents

Respondent Adoption Center of Choice is a Utah Adoption Agency licensed by the State of Utah to place children for adoption under the laws of Utah. Respondent Adoptive Parents are not named because of an order of the United States District Court sealing their identify in all proceedings. The Sealed Respondents are a husband and wife who adopted the minor child at issue in these proceedings.

The natural mother was a named party in the district court, but has not taken part in the proceedings in either the district court or in the Tenth Circuit Court of Appeals. Her whereabouts are unknown to Petitioner. The State of Arizona acquired jurisdiction over the natural mother in an Arizona paternity action involving the child, Petitioner, and the natural mother, but she has also defaulted in the Arizona Court Action.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 293 F.3d 1196 (10th Cir. 2002). The decision was filed with the Clerk of the Court on June 18, 2002. A copy of the Tenth Circuit Opinion is included in Appendix A at 1a through 21a. The opinion of the district court from which the appeal was taken is found in Appendix B at 22a through 45a.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued an opinion on June 18, 2002. On July 21, 2002, Petitioner filed a Petitioner for *en banc* hearing which was denied on August 1, 2002. A copy of the court of appeals order denying the Petition is included as Appendix C at 46a through 47a. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. Sections 1254(1) and 2106.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment XIV

> No state shall make or enforce any law which shall abridge the privileges or immunities of

citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

Federal Declaratory Judgment Act
28 U.S.C. §§ 2201

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

STATEMENT OF THE CASE

Procedural Background

This Petition involves a statute which creates what is known as a "putative father directory". Some form of the statute is found in virtually every state and is designed to address the problems created by parties who have children out of wedlock and where the mother fails or neglects to either learn the name of, or otherwise notify, the father prior to or after conception. The Utah Legislature adopted findings which are common to most states when putative father registry laws are passed.

> - The legislature finds no practical way to remove all risk of fraud or misrepresentation in adoption proceedings, and has provided a method for the protection of an unmarried biological father's rights by compliance with the provisions of this chapter. In balancing the rights and interests of the child and all parties affected by fraud, specifically the child, the adoptive parents, and the unmarried biological father, the Legislature has determined that the unmarried biological father is in the best position to prevent or deal with the effects of fraud and that, therefore, the burden of fraud shall be dealt with by him.
>
> The Legislature finds that an unmarried biological father who resides in another state may not, in every circumstance be reasonably presumed to know and strictly comply with the requirements of this chapter. Therefore when the following requirements have been met, that unmarried biological father may contest an adoption, prior to finalization of the decree of adoption, and assert his interest in the child; the court may then, in its discretion, and with an evidentiary hearing under Subsection 78-30-4.16(2) [thereafter follows the options of the Utah trial court.].
>
> UTAH CODE ANN. §30-4-15 (emphasis added)

Petitioner, a non-resident of Utah, filed a declaratory judgment action with pendent claims under state law in the United States District Court for the District of Utah seeking a declaration that the Utah putative directory law is unconstitutional as applied to Petitioner, a resident of the State of Arizona. Petitioner has never had any contact with the State of Utah. The district court initially declined to address Petitioner's request, but was directed by the Tenth Circuit Court of Appeals in Johnson v. Rodrigues, 226 F.3d 1103 (10th Cir. 2000) to decide the issues presented. The district court did as directed and held that the statute was constitutional. See Appendix D.

Petitioner appealed the final ruling of the district court to the Tenth Circuit Court of Appeals and a three (3) judge panel refused to review the decision of the district court, but then addressing the merits of the decision on alternate grounds never presented to the district court. The rationale used by the appellate court in reaching this decision has been rejected by the United State Supreme Court in previous decisions.

Underlying Facts

Petitioner was involved in acts of intercourse with another Arizona resident in Arizona which resulted in the conception of a minor child. The child was born in Utah in March 1997 without Petitioner's knowledge. The child is presently in the custody of the Adoptive Parents, who have at all times been domiciled in Utah. Respondent Adoption Center of Choice (the "Adoption Agency"), handled the adoption. The natural mother informed Petitioner, when they were both in Arizona, that she was pregnant, but that she had aborted the fetus during the first trimester.

On or about May 1, 1997, Petitioner learned from a friend in Arizona that the natural mother had not aborted, but had gone to Utah and birthed the child. Petitioner immediately filed a paternity petition in Arizona where he and the natural mother were domiciled for a determination of paternity and for custody (the "Arizona Action"). After service on the natural mother, the Arizona Court assumed jurisdiction, held hearings and entered orders. On June 4, 1997, the Arizona Court ordered the natural mother, Petitioner and the child to submit to DNA testing in Arizona.

On June 16, 1997, Petitioner learned that the child was in Utah and that by Utah law he was required to register with the Utah State Register of Vital Statistics, which he did immediately. On August 7, 1997, the Arizona Court made judicial findings that "the possibility of an adoption"of the "minor child is creating difficulty in Petitioner obtaining any information regarding the minor child".

On September 18, 1997, Petitioner filed the Arizona orders with the Utah state court pursuant to the Utah Foreign Judgment Act. The purpose of this action was to locate information on the whereabouts of the natural mother and the child and to aid the Arizona in its jurisdiction over the natural mother, the child, and Petitioner. Upon domestication of the judgement, the Utah state court issued subpoenas to the Utah hospital where the child had been born as well as to the Adoption Agency for medical records and information to be provided in the Arizona Action.

Through the Utah subpoena, Petitioner obtained information disclosing the pending adoption in Utah. However, he was unable to learn the court case number or even the judge involved because, under Utah law, adoption records are sealed and it is generally impossible to learn if an adoption is even pending. The subpoenas were not issued in the same action as the adoption.

Upon receipt of the medical records, Petitioner learned that the Adoption Agency had the child. Petitioner then contacted an employee of Adoption Agency on September 21, 1997, and sent facsimile copies of all the Arizona orders to the agency. The director of the Adoption Agency spoke with Petitioner by telephone and told him that the agency would not help him, that the adoption was complete, and there was nothing he could do about it. This statement was not true.

Two days later, on September 23, 1997, after the Adoption Agency had received the Arizona orders, Petitioner received a packet of information from the director which contained a letter from the Adoptive Parents stating that the adoption was final. This also was not true. It was subsequently learned after the filing of this federal action in Utah that the adoption was not finalized in the Utah state court until the next day; September 24, 1997.

The Adoption Agency refused to comply with the Arizona and the Utah Court orders, refused to give Petitioner the case number of the pending Utah adoption so that he could intervene there, refused to provide Petitioner with the location of the child and told him that he had no recourse. Petitioner did not know at that time where to locate the Adoptive Parents. Had Petitioner been given the needed information, he would have gone to the State of Utah and asserted his rights by special appearance in the Utah State Court adoption action. None of the Respondents gave Petitioner the opportunity to do so and all concealed from Petitioner the information he needed to become involved in the Utah adoption or to comply with Utah law.

Time Line of Facts

The following facts are presented in chronological order to further clarify the efforts of Petitioner to assert his parental rights, the efforts of others to avoid those rights, and the timing thereof.

May/June 1996 - Sexual relations in Arizona between Petitioner and the natural mother.

July/August 1996 - The natural mother tells Petitioner that she is pregnant in Arizona. Petitioner asks the natural mother to take a pregnancy test and provides the test in Arizona. The natural mother performs the test and claims that it was not positive nor negative.

October 1996 - Petitioner hears that the natural mother is pregnant and goes to her, but she will not see him. Petitioner believes she is still being untruthful about being pregnant.

November 1996 - Petitioner again hears that the natural mother is pregnant. He goes to her home again in Arizona. She advises Petitioner that she wants an abortion. Petitioner disagrees.

December 1996 - The natural mother contacts the Utah Adoption Agency from Arizona.

January 1997 - Petitioner sees the natural mother in Arizona and she appears pregnant. He asks her if she had an abortion of his child. The natural mother indicates she did.

February 1, 1997 - The natural mother travels to Utah from Arizona and stays in Adoption Agency's Utah Apartment.

February 4, 1997 - The natural mother sees Adoption Agency's doctor.

February 7, 1997 - Adoption Agency discusses Petitioner with the natural mother, and obtains a description of Petitioner.

February 11, 1997 - Adoption Agency agrees to send photographs of child to the natural mother in Arizona.

February 17, 1997 - The natural mother signs affidavit regarding Petitioner.

March 5, 1997 - Petitioner's child is born in Utah.

March 6, 1997 - The natural mother turns child over to Adoption Agency and signs relinquishment forms.

March 6, 1997 - Adoption Agency searches Utah Vital Records to see if Petitioner is registered. Utah Department of Health issues certificate that he is not. **No other searches are ever made of the registry.**

March 6, 1997 - Adoptive Parents pick up child from Adoption Agency.

March 13, 1997 - The natural mother leaves Utah.

April 17, 1997 - Adoptive Parents file Utah adoption action in state court.

April/May 1997 - Petitioner informed by the natural mother's friend in Arizona that the natural mother had a child. He goes to the natural mother's parents in Arizona who tell him to never come there again and that they don't know where the natural mother is. Petitioner goes to the court law library and starts researching paternity law.

May 1, 1997 - Petitioner files Arizona paternity action.

May 6, 1997 - The natural mother served with Arizona Paternity Action in Arizona.

June 4, 1997 - Arizona court holds hearing and entered orders.

June 12, 1997 - Petitioner completes Utah Department of Health Bureau of Vital Records Notice of Commencement of Paternity Proceedings, provides Arizona case number and location of Arizona court. Petitioner's signature is notarized by an Arizona Notary.

June 15, 1997 - Petitioner obtains a subpoena from the Arizona court for birth records.

June 20, 1997 - Petitioner obtains a subpoena from Arizona court for the records of "Hospital" seeking the "medical records for child born."

August 5, 1997 - Arizona court finds that Petitioner "has made several attempts to obtain information regarding the minor child" and that the "possibility of an adoption....is creating difficulty" for Petitioner in "obtaining information regarding the child" and then orders the hospital to produce the birth records.

September 7, 1997 - Petitioner signs a Petition to

Domesticate Order and Judgment from Arizona in Utah state court regarding the August 5, 1997 order of the Arizona court.

September 17, 1997 - Petitioner files Petition to Domesticate Order and Judgment from Arizona.

September 18, 1997 - Utah state court sends Notice of Judgment as the result of Petitioner's filing of the Petition to Domesticate Order and Judgment from Arizona.

September 19, 1997 - In response to a Utah state court subpoena, Hospital sends birth records of child to Petitioner in Arizona.

September 21, 1997 - Petitioner sends Adoption Agency, by facsimile, copies of all the Arizona court orders. Adoption Agency tells Petitioner he is "out of luck".

September 23, 1997 - Petitioner again contacts Adoption Agency. Adoptive Parents write a letter to Petitioner with pictures of child. Neither Adoption Agency nor Adoptive Parents mention that the final adoption hearing is the next day; in fact, the letter claims that the adoption has already occurred.

September 24, 1997 - Utah state court, in a separate action, signs adoption decree.

September 24, 1997 - Adoption Agency informs Petitioner that the adoption was final and there was nothing he could do about it or to get his child back.

September 25, 1997 - Petitioner contacts Adoption Agency, acknowledges receipt of photographs of the child and wants DNA tests. Adoption Agency refuses to assist Petitioner in any way.

September 30, 1997 - Petitioner obtains subpoena from Utah state court requiring Adoption Agency to produce all records related to child. Adoption Agency refuses to comply.

ARGUMENT FOR GRANTING WRIT

ARGUMENT I

The Utah Putative Father Registry statutes deny non-resident fathers the equal protection of the law and unconstitutionally abridges a non-resident father's fundamental parental rights

The United States Supreme Court in Lehr v. Robertson, 463 U.S. 248 (1983) reviewed a New York putative father registry statute and held that registration with the state is a statutory demonstration of a putative father's intent to claim paternity of a child born out of wedlock. The New York statute granted putative fathers an entitlement to receive notice of any and all proceedings to adopt and an opportunity to be heard before a final adoption decree entry. The Utah statute at issue is similar to the New York Statute with one major and fatal difference.

Under the New York statute, the court, before entering an adoption decree, is required to examined the putative father registry to determine if a putative father had registered. Utah law has not such requirement, but rather allows the Adoptive Parents or agency to check the registry at any time. In this case, the registry was checked by the Adoption Agency the day after the birth of the child and was never checked again when the adoption did not occur for another seven months. Had the registry been checked by the Utah state court on the date of the adoption, Petitioner's registration and information about the Arizona assumption of jurisdiction and its orders would have been discovered by the Utah state court and the concealment of these facts from the state court would have been discovered.

The New York statute was held constitutional because it protected a reasonable father's efforts to assert his rights. Of particular note to this Court in Lehr, all fathers who registered under the New York statute, up to the day of the final adoption, are given notice and afforded an opportunity to be heard, thus protecting their interests. Conversely, the Utah statute does not do so, especially in the case of non-Utah residents. Due process is virtually ignored by the Utah law. As made clear in Lehr, a State may ignore a putative father only under specific circumstances and when certain standards for the protection of the father's rights are present. The Utah statute fails to meet these standards.

Of concern to the Lehr Court was the fact that the New York putative father had "never had any significant custodial, personal, or financial relationship with [the child], and he did not seek to establish a legal tie until after she was two years old". Conversely, Petitioner has made every reasonable effort to establish his parental rights in his child since he learned of its birth. Thus, the facts of the present case establish that Petitioner meets the Lehr standards. In addition, Petitioner was lied to about the facts so that he could not assert his interest in the Utah adoption proceedings. Certainly, neither this Court nor the Utah courts should condone such tactics.

The damaging effects of the Utah statutory scheme in this regard are further compounded by not requiring a final check of the putative father directory prior to finalization of the adoption by the court, and by sealing adoption records so that Petitioner and others who diligently seek to learn of adoptions cannot do so. As a result, Petitioner was unable to intervene in the adoption proceedings because the adoption statutes directly conflicts with the putative registry statute.

In sum, the Utah putative father registry is unconstitutional as applied to out of state fathers who would have no reason to believe that a child conceived in another state would ultimately be born in Utah. As a result, in conjunction with Utah adoption statutes which seal records and make it impossible for a putative father to assert his parental rights once a child is born. Because the effect of the Utah putative father registry is to deny equal protection of the laws to out of state residents, this Court should strike down this law as presently written.

ARGUMENT II

A. The appellate court's refusal to decide the appeal on constitutional grounds is in direct conflict to statutory and case law establishing a duty to review the issues placed before it.

The refusal of the court of appeals to review the decision of the district court denies Petitioner his appeal of right under 28 U.S.C. § 1291. In Prentis v. Atlantic Coast Line, 211 U.S. 210 (1908), the United States Supreme Court instructed appellate courts to ensure that this important right by deciding issues properly placed before them to guard against injustice, holding,

> As a further protection against possible injustice, an appeal of right to the Supreme Court of Appeals is given to any aggrieved party, and if denied by that appellate court any right assured by the Constitution and laws of the United States, redress may be had by invoking the paramount jurisdiction of this court.

Congress has also addressed similar concerns by giving citizens of the United States the right to seek declaratory judgment relief, directing district courts decide constitutional issues properly placed before it. In 28 U.S.C.§ 2201 (a) it states,

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Id. (Emphasis added).

The court of appeals refused to review the declaration of the Utah district court that the Utah Adoption laws as applied to non-Utah residents, is constitutional. Rather, the court of appeals diverted its attention and declined to grant review because of its belief that this was a civil rights case dealing with issues of state action. It should be noted that neither the complaint nor the motions before the District Court mentioned any civil rights issue. The Tenth Circuit acknowledged that it did not intend to address the constitutional issues raised in the district court:

> Appellant Victor Johnson of Arizona, putative Petitioner of a child born out of wedlock and subsequently adopted by a married couple, filed a complaint in the district court against the biological mother, the adoptive parents and The Adoption Center of Choice. He contended that the Utah Adoption Statue, as applied to him, violated the Due Process Clause of the Fourteenth Amendment. Utah Code §78-30-1 to 78-30-19 (1996 & Supp. 2000). He also asserted various state law claims.
>
> **He sought a judgment declaring that the Utah state courts "were without jurisdiction over Appellant to terminate his parental rights," because the Utah Adoption Statute was unconstitutional.** Appellant's Brief at 30. Because the defendants were citizens of Utah, or a state other than Arizona, he averred subject matter jurisdiction based on diversity of citizenship. **Upholding the constitutionality of the statute, the district court granted summary judgment** in favor of the defendants on both federal and state issues. (Emphasis added.)
>
> In the original briefing before us, the parties discussed the merits of the constitutional argument. We asked for supplemental briefing on whether a claim based upon a Fourteenth Amendment deprivation could properly be lodged against non-public defendants, and heard oral argument on the question of whether Appellees acted under color of state law. We now decide that Appellees were not state actors, and affirm the judgment of the district court **without meeting the substantive**

> **constitutional question.** (Emphasis added.)

Appendix A at 2a-3a. As this passage makes clear, the appellate court has shirked its responsibility to address the constitutional issues brought to it by the Petitioner. This Court should remand this matter to the Tenth Circuit Court of Appeals for further review of these issues.

B. The state action requirement relied on by the appellate court is contrary to decisions of this Court

The court of appeals declined to review the actions of the district court because it found no "state actors" or that those involved were "acting under color of state law". This requirement for statutory constitutionality review is contrary to this Court's decisions, including Lehr, which did not involve any "state actors." For example, in Troxel v. Granville, 120 S.Ct. 2054, 530 U.S. 57, (U.S. 2000), which did not involve any "state actors" and which was an action between grand parents and a mother in the Washington State's domestic relations court, Justice O'Connor stated,

> The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, "guarantees more than fair process." *Washington v. Glucksberg,* 521 U.S. 702, 719, 117 S.Ct. 2258 (1997). The Clause also includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.*, at 720, 117 S.Ct. 2258; see also *Reno v. Flores,* 507 U.S. 292, 301-302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993).

The sole state involvement in Troxel was the action of the state court and none other. Justice O'Connor continued,

> The liberty interest at issue in this case--the interest of

> parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in *Pierce* that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.*, at 535, 45 S.Ct. 571. We returned to the subject in *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.*, at 166, 64 S.Ct. 438.
>
> In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.

Thus, the appellate court's requirement that state actors be involved in order to trigger constitutional scrutiny is in error. As this Court noted in Lehr, and is the situation at issue here, regardless of wether state actors are involved, the Petitioner is entitled to **"substantial protection under the Due Process Clause"** of the United States Constitution regarding the application of the Utah putative father registry.

C. The Constitutional Issues Were Decided At the Direction of the Court of Appeals

What is even more puzzling about the appellate court's refusal to address the constitutional issues is that the court itself directed the district court to address the issues in ruling on the first appeal. This matter was first before the Court of Appeals in Johnson v. Rodrigues, 226 F.3d 1103 (10th Cir. 2000) (See Appendix D), when the district court refused to exercise jurisdiction to determine the constitutionality of the Utah Adoption Statutes. The court of appeals in the first appeal outlined the nature of this lawsuit and the actions that the district court must take on remand, stating,

> Plaintiff Victor Johnson (Plaintiff) brought this action under federal question jurisdiction and as a diversity case, seeking declaratory relief and citing 28 U.S.C. Section 1331 and 1332 (a) (1) and the declaratory judgment act. He asserted that Utah's adoption statutes unconstitutionally denied him -- the purported father of a child whose adoption had been obtained in Utah -- notice and an opportunity to be heard.
>
> . . . neither Plaintiff's constitutional claim challenging the Utah adoption laws nor his tort claim fall within the domestic relations exception. **These claims should be considered and decided on remand by the district court.** (Emphasis added.)

While the district court complied with the mandate of the court of appeals, the court of appeals now refuses to review the decision on the constitutional issues. This Court should instruct the appellate court to review their decision, keeping in mind the way they originally framed the case on remand to the district court.

D. There is no basis for the appellate court's decision to frame this matter as a civil rights action.

In the first appeal, the appellate court stated clearly that this case has never involved a claim under the Civil Rights Act. Even if it could be so construed as the Tenth Circuit now suggests, the state actor requirement is contrary its on decision in the first appeal, noting,

> At the hearing which resulted in that May 11, 1999 order, the District Judge stated she was going to dismiss the case because she concluded she did not have subject matter jurisdiction; that the Plaintiff's remedy when challenging an adoption in the state court system was to bring an action in the state court for some sort of collateral relief, either alleging fraud or, as the judge understood it, the unconstitutionality of the statute; and that under Anderson v. Colorado, 793 F.2d 262 (10th Cir. 1986), federal district courts are without authority to review state court judgments where the relief sought is in the nature of appellate review. The judge said that the Plaintiff's claims were essentially seeking to undo the adoption decision of the Utah state court, and therefore his case "fits squarely within the parameters of the Doe-Feldman doctrine which prohibits me, a federal district court, from reviewing the state court judgment."

Appendix D at 73a - 74a. Thus, had the appellate court simply reviewed their own pronouncement of the issues it would have been clear what the issues were in the second appeal. By failing to do so, the appellate court has misinterpreted what is at issue and the decision of the appellate court is flawed as a result.

E. The decision of the court of appeals is contrary to Utah law.

Finally, the decision of the appellate court fails to apply Utah law and is in error. No Utah courts have ever held its law constitutional as applied to non-Utah residents without notice of the birth of a child. See Adoption of Baby Boy Doe, 717 P.2d 686, (Utah 1986), Ellis v. Social Services Department of the Church of Jesus Christ of Latter-day Saints, Utah, 615 P.2d 1250 (1980); T.R.F. v. Felan, 760 P.2d 906, (Utah App. 1988) Swayne v. L.D.S. Social Services, 795 P.2d 637, (Utah 1990) In re Adoption of B.B.D., 984 P.2d 967, (Utah 1999).

In sum, the decision of the court of appeals is faulty in several significant ways. Petitioner asks this Court to remand the decision to the Tenth Circuit for a decision that is in harmony with federal law, state law and the law of this case as previously established.

ARGUMENT III

The Issues Are Exceptionally Important

The issue of adoption and how to handle the rights of putative fathers is of major importance to the public. If the Court allows the decision of the Tenth Circuit to stand without a full review, a major injustice will occur. The ruling of the district court and the refusal of the court of appeals to adequately review that decision allows Utah residences to effectively kidnap children from other states without being held to the United States Constitution. Such a situation is unconscionable and this Court should use its powers to remedy the injustice perpetrated on the Petitioner as well as resolving an issue that is sure to occur in the future.

CONCLUSION

Petitioner was denied due process, as guaranteed by the United States Constitution, when the State of Utah applied its law to him, as a non-resident who had no contacts with Utah, by requiring him to register with Utah or lose all rights to his child. Utah law than allowed the adoption of Petitioner's child by a Utah couple without notice to Petitioner, without Petitioner's knowledge or consent, and without an opportunity for Petitioner to be heard in a meaningful way.

The Utah Adoption laws are unconstitutional as applied to non-Utah residents who have no contact with Utah and who have no reason to believe that Utah could or would assert its jurisdiction over his out of wedlock child. There is no way that Utah can assert any jurisdiction over Petitioner because of the lack of minimum contacts with the state. Not only are there no minimum contacts, there were no contacts at all, other than contacts regarding the birth of Petitioner's child, the facts of which were concealed by other parties.

The court of appeals must decide if the district court was correct in finding that the Utah adoption laws are constitutional as applied to Petitioner. A non-resident is entitled to seek declaratory relief to determine the constitutionality of a state law in a federal court even where there are no "state actors" involved in the adoption of the child by a private adoption agency to a private party under Utah law. Federal law requires the court of appeals to review such determinations.

Based on the foregoing, the Petition for Writ of Certiorari should be granted.

Dated 29th day of August, 2002.

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APPENDIX

Appendix A
Johnson v. Rodrigues, 293 F.3d 1196 (10th Cir. 2002)

Appendix B
Opinion of the District Court

Appendix C
Denial of En Banc Hearing

Appendix D
Johnson v. Rodrigues - 226 F.3d 1103 (10th Cir. 2000)

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit

June 18 2002
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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

VICTOR JOHNSON,

Plaintiff-Appellant,

v. No. 01-4156

MONICA RODRIGUES (OROZCO); SEALED DFT-98-550-1; SEALED DFT-98-550-2, and ADOPTION CENTER OF CHOICE,

Defendants-Appellees,

Appeal from the United States District Court
for the District of Utah
D.C. No. 2:98-CV-550-C

C. Robert Collins of Collins & Collins, Phoenix, Arizona, for Plaintiff-Appellant.

Karra J. Porter (Barton H. Kunz II with her on the brief) of Christensen & Jensen, P.C., Salt Lake City, Utah, for Adoption Center of Choice Defendant-Appellee.

Phillip E. Lowry of Howard, Lewis & Petersen, Provo, Utah, for sealed Defendants-Appellees.

Before TACHA, Chief Judge, ALDISERT[1], and SEYMOUR, Circuit Judges.

ALDISERT, Circuit Judge

Appellant Victor Johnson of Arizona, putative father of a child born out of wedlock and subsequently adopted by a married couple, filed a complaint in the district court against the biological mother, the adoptive parents and The Adoption Center of Choice. He contended that the Utah Adoption Statue, as applied to him, violated the Due Process Clause of the Fourteenth Amendment. Utah Code Ann. §§ 78-30-1 to 78-30-19 (1996 & Supp. 2000). He also asserted various state law claims.

He sought a judgment declaring that the Utah state courts "were without jurisdiction over Appellant to terminate his parental rights," because the Utah Adoption Statute was unconstitutional. Appellant's Brief at 30. Because the defendants were citizens of Utah, or a state other than Arizona, he averred subject matter jurisdiction based on diversity of citizenship. Upholding the constitutionality of the statute, the district court granted summary judgment in favor of the defendants on both federal and state issues.

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[1] Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

In the original briefing before us, the parties discussed the merits of the constitutional argument. We asked for supplemental briefing on whether a claim based upon a Fourteenth Amendment deprivation could properly be lodged against non-public defendants, and heard oral argument on the question of whether Appellees acted under color of state law. We now decide that Appellees were not state actors, and affirm the judgment of the district court without meeting the substantive constitutional question. We affirm also the district court's treatment of claims brought under Utah law.

I.

The district court originally had jurisdiction over this matter pursuant to 28 U.S.C. § 1332. A timely appeal was filed pursuant to Rule 4(a) (1), Federal Rules of Appellate Procedure. We have jurisdiction pursuant to 28 U.S.C. § 1291.

"The Court reviews a district court's decision to grant summary judgment de novo, applying the standard set forth in Fed.R.Civ.P. 56(c)." Wright v. Abbott Labs., Inc., 259 F.3d 1226, 1231 (10th Cir. 2001); Byers v. City of Albuquerque, 150 F.3d 1271, 1274 (10th Cir. 1998). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure.

II.

Because of the view we take, only a brief review of the extensive factual and procedural background is necessary. Victor Johnson and Monica Rodrigues Orozco engaged in a brief sexual relationship in1996 in Phoenix, Arizona. Throughout this "relationship," which lasted between one to two months, Johnson did not even know Orozco's last name. Appellee's Supp. App. at 139-142, 196. Indeed, Johnson apparently knew very little about Orozco. He was unaware of how he had met her, how she was employed, where she was from, where she had gone to school, whether she had siblings, or even the name of her daughter. Id. at 133-135. He considered his association with Orozco to be casual, and when a person he referred to as his "girl friend" returned from California with the two children he had fathered with her, he promptly ended the relationship with Orozco. Id. at 152.

Approximately a week thereafter, Orozco telephoned Johnson's home to inform him of her pregnancy. Her call was answered by Tracy Dennis, Johnson's former girlfriend, who was still living with Johnson, along with his current girlfriend, and his current girlfriend's children. Notwithstanding these unique entangling domestic alliances, Johnson drove to Orozco's home and asked her to take a home pregnancy test he had purchased. He handed the testing materials to her and awaited the results. Orozco then told him that she had made a mistake while administering the test, and did not get a result.

Approximately three months later, a friend told Johnson that Orozco was, in fact, pregnant. Confronted with this news, Johnson took no action. The following month, he was told again by the same friend that Orozco was pregnant. Again, he did nothing. Some three months passed and Johnson encountered Orozco at a chance meeting in a Phoenix mall, when she was seven and a half months pregnant. When he told her that he would be willing to take care of her financially, she told him that because he had not been willing to help her out early in the pregnancy, she was not interested in his help at this late stage.

Monica decided to place the child for adoption. On February 1, 1997, she traveled to Orem, Utah, and contacted the Adoption Center of Choice. It placed her in an apartment to await full term. Johnson was unaware that she had gone to Utah. On March 5, 1997, Orozco gave birth to a daughter, and on the following day relinquished her parental rights to the adoption center at 2:15 p.m. At 3:15 p.m., the agency examined the birth certificate and determined that no father had been named. It then searched the Utah Bureau of Vital Records' putative father list, and found no paternity claims regarding Orozco's child. Later that day, the infant was placed with its adoptive parents.

Orozco left Utah the following week to stay with an aunt in Wisconsin. Shortly after the child's birth, Johnson learned from Orozco's former roommate that the child had been born.

About a month later, on April 15, 1997, Johnson went to Orozco's mother and told her of his intent to seek custody of her daughter's child.

III.

There followed a series of legal proceedings. On April 17, 1997, the adoptive parents filed a verified petition for adoption in Utah's Fourth District Court. Under Utah law, a decree of adoption may be entered six months after the child is placed in the adoptive parents' home. On May 1, 1997, in an Arizona state court, not a Utah court, Johnson filed a complaint for paternity and child custody against "Monica Rodrigues" [Orozco]. However, he did not file a paternity claim with the Arizona Bureau of Vital Records. The Arizona court ordered Johnson, Orozco, and Orozco's baby to undergo laboratory paternity testing, and set another hearing date.

On June 12, 1997, Johnson filed a notice of commencement of paternity proceedings with the Utah Bureau of Vital Records. Soon thereafter, Johnson procured domestic relations subpoenas directed towards the Utah Bureau of Vital Records and the Utah hospital where Orozco's baby was born. A hearing on Johnson's request was held in Arizona on August 5, 1997, at which time the court ordered the Utah hospital to release the medical records to Johnson. Orozco did not attend the hearing.

On September 8, 1997, Johnson filed a petition in the Fourth District Court of Utah to register the Arizona court order. The order was filed on September 18, 1997. The final decree of adoption in favor of the baby's adoptive parents was issued by the Fourth District Court of Utah on September 24, 1997.

After the adoption was finalized, Johnson made harassing telephone calls to the adoptive parents, having learned their identity from confidential information he had obtained. Over the telephone, he pretended to be someone else, and asked the adoptive parents personal questions about the infant. The adoptive parents reported the phone calls to the local police, who then contacted Johnson.

Johnson then filed an action in the United States District Court for the District of Arizona on November 21, 1997, alleging (1) tortious interference with family relations, (2) violation of the Parental Kidnaping Prevention Act, and (3) intentional infliction of emotional distress. He sought damages of $1,000,000, as well as custody of the child. The court dismissed his case on May 18, 1998, holding that it lacked personal jurisdiction over the defendants.

Seven months later, on June 26, 1998, Johnson filed the present action in the United States District Court for the District of Utah. The court granted the motion for dismissal filed by the adoption center and the adoptive parents, stating, inter alia, that it lacked subject matter jurisdiction under Rooker-Feldman abstention. See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). Johnson appealed to this court, which affirmed in part and reversed in part, determining that neither Johnson's constitutional nor tort claims fell within the teachings of Rooker-Feldman. We determined that "neither Plaintiff's constitutional claim challenging the Utah adoption laws nor his tort claim [fell] within the domestic relations exception. These claims should be considered and decided on remand by the district court." Johnson v. Rodrigues, 226 F.3d 1103, 1112 (10th Cir. 2000). Upon remand, the parties filed cross-motions for summary judgment. The court granted the joint motion filed by the adoption center and the adoptive parents, and denied Johnson's motion.

Shortly before the adoptive infant's fifth birthday, Johnson appealed the summary judgment ruling to this court.

IV.

Appellant argues here, as he did in the district court, that he is not basing his claim on 42 U.S.C. § 1983. This he does, notwithstanding the fact that the district court opinion begins with the following statement: "Plaintiff Victor Johnson's claims in this lawsuit, brought under 42 U.S.C. § 1983 . . ." Johnson v. Rodrigues, No. 2:98-CV-550C, Order at 1 (D.Utah 2001) (hereinafter "Order"). It cannot be denied that Victor Johnson is alleging a violation of the Fourteenth Amendment that provides, in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Irrespective of whatever label Appellant wishes to place on the procedural vehicle he is utilizing to assert a Fourteenth Amendment deprivation, it is beyond cavil that in order to prevail, the United States Constitution requires activity by a state. The procedural vehicle for this action in a federal court is found in the Civil Rights Act of 1874, partially codified in 42 U.S.C. § 1983.[1]

The Court has explained that:

> A claim upon which relief may be granted to [plaintiffs] against [defendants] under § 1983 must embody at least two elements. [The plaintiffs] are first bound to show that they have been deprived of a right "secured by the Constitution and the laws" of the United States. They must secondly show that [defendants] deprived them of this right acting "under color of any statute" of the [state]. It is clear that these two elements denote separate areas of inquiry.

Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978). Assuming that Johnson has alleged a deprivation of a federal right, we then proceed to decide whether he has fulfilled the second requirement, namely, a demonstration that either the adoption center or the adoptive parents acted under color of state law.

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[1] By contrast, a state court action challenging the adoption proceedings would not necessarily involve the same requirements as a federal action alleging the deprivation of a Fourteenth Amendment right.

The Court has created a two-part test to determine whether a private person's action constitutes state action:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982).

V.

To support a thesis that Appellees acted under color of state law, Johnson summarized his argument as follows:

> The adoption placement was under "color of state law and is thus subject to section 1983 liability." It cannot be said that Appellees are [sic] "nominally private party," but rather they are actors. There is a "nexus" between what the state requires of Appellees and what the state an [sic] Appellees actually do. The relationship is also "symbiotic" and results in "joint action" between the state and private adoption agencies. The "promotion" of adoption is a "traditional public power" and "public function."

Appellant's Supp. Brief at 6-7. We now turn to these contentions.

It is undisputed that neither the adoption agency, a private party, nor the adoptive parents, other private parties (the Appellees here), are employees of the state of Utah. Private individuals and entities may be deemed state actors, however, if they have "acted together with or [have] obtained significant aid from state officials, or [if their] conduct is otherwise chargeable to the state." Lugar, 457 U.S. at 937.

In Gallagher v. "Neil Young Freedom Concert," 49 F.3d 1442 (10th Cir.1995), we issued a comprehensive opinion that discussed in detail the tenets of what constitutes action under "color of law" by private parties. We discussed therein four tests delineated by the Court to determine whether private parties should be deemed state actors when conducting a state action analysis: (1) the public function test, (2) the nexus test, (3) the symbiotic relationship test and (4) the joint action test.

> The Court has taken a flexible approach to the state action doctrine, applying a variety of tests to the facts of each case. In some instances, the Court has considered "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so c that the action of the latter may be fairly treated as that of the State itself." The Court has also inquired whether the state has "so far insinuated itself into a position of interdependence" with the private party that there is a "symbiotic relationship" between them. In addition, the

> Court has held that if a private party is a "willful participant in joint activity with the State or its agents," then state action is present. Finally, the Court has ruled that a private entity that exercises "powers traditionally exclusively reserved to the State" is engaged in state action.
>
> Under each of these our tests, "the conduct allegedly causing the deprivation of a federal right" must be "fairly attributable to the State." In order to establish state action, a plaintiff must demonstrate that the alleged deprivation of constitutional rights was "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." . . . In order to resolve the state action question before us, we will apply these general principles and each of the tests articulated by the Supreme Court.

49 F.3d at 1447 (citations omitted). Appellees respond that the adoption center and the adoptive parents cannot be considered state actors under any test. We agree.

A.

The public function test consists of determining whether the state has delegated to a private party "a function traditionally exclusively reserved to the States." Id. This is an arduous standard to satisfy. "While many functions have been traditionally performed by governments, very few have been `exclusively reserved to the State.'" Flagg Bros., 436 U.S. at 158 (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 356 (1974)). This often involves situations such as when private parties hold elections, perform necessary municipal functions, or run a nursing facility. In situations such as these, the actions taken were considered to be equivalent to state action, because the private parties performed a service which was traditionally the exclusive prerogative of the state.

Johnson has not presented any evidence indicating that the adoption center or adoptive parents are the "exclusive means to adopt children in Utah." Indeed, four and a half pages of adoption agencies are listed in the Salt Lake City Yellow Pages. Because all actors involved here were private parties, and there was no exclusive state involvement in the adoption process, we agree that there was no state action under the public function test.

B.

"Under the nexus test, a plaintiff must demonstrate that 'there is a sufficiently close nexus' between the government and the challenged conduct such that the conduct 'may be fairly treated as that of the State itself.'" Gallagher, 49 F.3d at 1448 (citing Jackson, 419 U.S. at 351). We have stated that under this approach, "a state normally can be held responsible for a private decision 'only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." Id. (citing Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)). Merely availing oneself of state judicial procedures is insufficient to constitute state action. Lugar, 457 U.S. at 939 n. 21.

Johnson has not presented any evidence indicating a nexus between the state of Utah and either the adoptive parents or the adoption center. Further, he has not demonstrated that the state exercised coercive power or provided significant encouragement to the parties involved. Monica Orozco and the adoptive parents made a private decision — without either state support or encouragement — to voluntarily avail themselves of the state's adoption laws. The adoption center made a private decision to facilitate the adoption. Thus, no nexus existed between either of the private parties and the state of Utah.

C.

Under the analysis referred to as the "symbiotic relationship test," the state must have "'so far insinuated itself into a position of interdependence' with a private party that 'it must be recognized as a joint participant in the challenged activity.'" Gallagher, 49 F.3d at 1451 (citing Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)). We have noted that "extensive state regulation, the receipt of substantial state funds, and the performance of important public functions do not necessarily establish the kind of symbiotic relationship between the government and a private entity that is required for state action." Id. Our research indicates that the first reference to the word "symbiotic" in discussing the color of law concept appears to be found in Moose Lodge v. Irvis, 407 U.S. 163, 175 (1972) where the court noted:

> Here there is nothing approaching the symbiotic relationship between lessor and lessee that was present in Burton, where the private lessee obtained the benefit of locating in a building owned by the state-created parking authority, and the parking authority was able to carry out its primary public purpose of furnishing parking space by advantageously leasing portions of the building constructed for that purpose to commercial lessees such as the owner of the Eagle Restaurant. Unlike Burton, the Moose Lodge building is located on land owned by it, not by any public authority.

Johnson has not alleged any facts which would indicate that the state of Utah has insinuated itself into a position of long-term interdependence with either the adoption center or the adoptive parents. In Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n., 531 U.S. 288 (2001), the Court emphasized:

> Our cases try to plot a line between state action subject to the Fourteenth Amendment scrutiny and private conduct (however exceptional) that is not. . . . What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.

Brentwood, 531 U.S. at 295.

Having stated the foregoing, the Court then introduced a new locution into the legal lexicon for use in determining whether a private party's actions constituted state action — entwinement.

The entwinement down from the State Board in therefore

> unmistakable, just as the entwinement up from the member public schools is overwhelming. Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it.

Id. at 302.

Speaking through Justice Souter, the Court found "entwinement"[2] in light of the fact that 84 percent of the members of the interscholastic athletic association were public schools.[3] Thus, although the nomenclature is new, its meaning appears to be comparable to what the Court has previously described as a "symbiotic relationship."

Symbiosis is defined as "the living together in more or less intimate association or even close union of two dissimilar organisms" or "the intimate living together of two dissimilar organisms in any of various mutually beneficial relationships; mutual cooperation between persons and groups in a society especially when ecological interdependence is involved." Webster's Third New Int'l Dictionary of the English Language, Unabridged (1968). Entwinement is defined as "the action of entwining," while the definition of entwine is "to twine together, to interweave, attach or involve inextricably in sentiment or thought." Id.

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[2] But see the opening sentence in the dissenting opinion in Brentwood: "We have never found state action based upon mere 'entwinement.'" Brentwood, 531 U.S. at 305 (Thomas J., dissenting).

[3] This apparently is the most noteworthy difference that prompted the Court to distinguish the facts in Brentwood from those in National Collegiate Athletic Assoc. v. Tarkanian, 488 U.S. 1988 (1988). State action was found in Brentwood, which involved a private corporation that organized interscholastic athletics and sponsored tournaments among private and public high schools. Tarkanian involved an unincorporated association consisting of approximately 960 private and public universities and colleges. The association promulgated rules governing member institutions' recruiting admissions, academic eligibility and financial aid standards for student athletes. In Tarkanian the Court found there was no state action.

The only state involvement alleged by Johnson was the issuance of the adoption decree by a state court. The Court has noted that "a private party's mere invocation of state legal procedures [does not] constitute[]joint participation or conspiracy with state officials satisfying the § 1983 requirement of action under color of law." Lugar v. Edmondson Oil Co., Inc., 457 U.S. at 939 n. 21 (internal quotations omitted).

In the circumstances alleged in the case at bar, there was no close union between Utah and either of the private Appellees, and no interweaving between them and the state. Thus, whether tested from the standpoint of a symbiotic relationship or its related concept, entwinement, the Appellees' conduct did not constitute activity under color of state law.

D.

Under the joint action test, "state action is also present if a private party is a `willful participant in joint action with the State or its agents.'" Gallagher, 49 F.3d at 1453 (citing Dennis v.

Sparks, 449 U.S. 24 (1980)). When applying this analysis, courts generally "examine whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights." Id. Most decisions discussing this concept hold that if there is a substantial degree of cooperative action between state and private officials, or if there is "overt and significant state participation" in carrying out the deprivation of the plaintiff's constitutional rights, state action is present. Id. at 1454 (citing Hoai v. Vo, 935 F.2d 308, 313 (D.C. Cir. 1991)). This was not present here.

VI.

Although we have referred to the foregoing analyses as "tests," the Third Circuit has noted the emphasis on "facts" in the Court's Brentwood decision:

> The Supreme Court has established a number of approaches to this general question [of what private activity can be attributed to the state] which it recently said are essentially "facts that can bear on the fairness of such an attribution." Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001). Regardless of whether these are "test" or "facts," Brentwood directs courts to focus on the fact-intensive nature of the state action inquiry, mindful of a central purpose: to "assure that constitutional standards are invoked `when it can be said that the State is responsible for the specific conduct of which the plaintiff

> complains.'" Id. at 295 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (emphasis in original)).

Crissman v. Dover Downs Entm't, 289 F.3d 231, 239 (3d Cir. 2002) (en banc). The Crissman court further noted:

> The Supreme Court pointed out in Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), that it has never been clear "[w]hether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in [each] situation." Id. at 939. See also Groman v. Township v. Manalapan, 47 F.3d 628, n. 16 (3d Cir. 1995). Brentwood seems to embrace the second understanding.

Id. at 239 n. 12.

It bears mention that in Brentwood, the Court emphasized that "[s]tate action may be found if, though only if, there is such a `close nexus between the State and the challenged action' that seemingly private behavior `may be fairly treated as that of the State itself.'" 531 U.S.at 295 (citing Jackson, 419 U.S. at 351) (emphasis added).

VII.

Johnson alleged no facts demonstrating any degree of cooperative action or overt, significant participation by Utah state officials. The only action arguably taken by a state official is the issuance of the adoption decree by the state court. As we have previously demonstrated, this is not enough.

Johnson describes in detail how the adoption center and the adoptive parents worked together to effectuate the adoption, insinuating that the combination of their efforts was tantamount to a conspiracy to deprive him of his constitutional rights, all with the imprimatur of the state. His problem, however, is that he neglects to set forth with any specificity the role the state of Utah played in this alleged conspiracy. Appellant's Supp. Brief at 5.

Finally Johnson asserts, with no supporting factual basis, that the adoption agency acted under the authority of the state of Utah and ". . . represented the state in the capacity [of placement of children for adoption]." Id. at 6. He notes the statutory mandate that licensed adoption agencies should "promote adoption when that is a possible and appropriate alternative for a child." See Utah Code 62A-4a-607. To encourage private agencies to promote adoption does not metamorphose private performance into government activity.

Accordingly, because the rights assured by the Fourteenth Amendment refer to state action, and having determined that Appellees did not act under color of state law, we hold that Appellant may not prevail on his constitutional contentions.

VIII.

Appellant alleged two state tort claims in his original action: intentional infliction of emotional distress and tortious interference with family relations. The district court rejected both claims. Johnson argues that the district court was precluded from even addressing the merits of these claims because this court "had already decided in the first appeal that the tort claims should be allowed . . ." Appellant's Brief at 24-25. He also argues that the act of dismissing these state claims was "not within the subject matter jurisdiction for [sic] the District Court . . ." Id. at 24. When this case was before us previously, we explicitly directed that "[t]hese [tort claims] should be considered and decided on remand to the district court." Johnson v. Rodrigues, 226 F.3d at 1112.

A.

To state a claim for intentional infliction of emotional distress in Utah, a plaintiff must demonstrate "that the defendant intentionally engaged in some conduct toward the plaintiff considered outrageous and intolerable in that it offends the generally accepted standards of decency and morality." Russell v. Thomson Newspapers, Inc., 842 P.2d 896, 905 (Utah 1992). Under Utah law, this is a question of law to be decided by the courts. DeBry v. Godbe, 992 P.2d 979, 986 (Utah 1999). Making this demonstration involves a heavy burden in which the plaintiff must exhibit "extraordinarily vile conduct, conduct that is `atrocious, and utterly intolerable in a civilized community.'" Retherford v. AT&T, 844 P.2d 949, 978 n. 19 (Utah 1992).

Johnson suggests that the conduct of one employee of the adoption center was outrageous because the employee refused to reveal personal information about the adoption to Johnson, and then expressed doubts about his financial ability to bring a law suit. He asserts that the adoptive parents also exhibited outrageous behavior by calling the police and reporting that someone (Johnson himself, as was later discovered) was calling their home and pretending to be someone else, in an attempt to fraudulently elicit personal information about the adopted child. Appellant's Brief at 28-29. The district court held that "[e]ven if the adoptive parents had inexplicably reported Johnson to the police for no reason, such would not rise to the level of `outrageous and intolerable' conduct — as Johnson was only embarrassed and `pissed off' by the unexpected police visit." Johnson v. Rodrigues, Order at 21. The district court held that the adoption center's actions conformed with the Utah Adoption Statute, and as such, "Defendants' actions in conformity with this statute, therefore, cannot be said to be `outrageous and intolerable' under Utah law." Id. at 22.

B.

Appellant appears to assert his tortious interference claim against the adoption agency, as well as against the adoptive parents. The district court plainly stated that there "is some doubt as to whether such a cause of action exists at all under Utah law." Id. It held that "[e]ven assuming, without holding, that such a cause of action exists . . . it appears from the facts of this case that Johnson would be unable to bring such an action . . . [because] `[p]arental rights do not spring full-blown from the biological connection between parent and child . . . [but rather] require relationships more enduring.'" Id. at 23 (citing Lehr, 463 U.S. at 260). Although Appellant was fully aware of the district court's doubts regarding whether such a cause of action exists, he was unable to supply this court with Utah state cases or statutes supporting his contention. He refers to Norton v. MacFarlane, 818 P.2d 8 (Utah 1991), which, he says, "specifically acknowledged the right of a party to recover in tort when his family relationships are even negligently injured by a third party." Appellant's Brief at 29. Although Norton acknowledges that the Utah Constitution allows damages for loss of consortium interests that arise in a wrongful death action, this does not "constitute an independent parental action for alienation of affections, especially when not associated with a wrongful death case." Appellee's Brief at 45. The district court commented:

> Johnson did not attempt to create any sort of family relationship with Orozco before the child's birth, and his claim of paternity was filed only after the baby had already been born and placed with its adoptive parents. Johnson's connection with the baby, at least before the baby's birth, was biological only. Under these circumstances, it cannot be said that Defendants' actions could have represented interference with any constitutionally protected "family relationship."

Order at 23. We hold that the district court did not err in granting summary judgment to the adoption center and the adoptive parents on the state tort issues.

* * * * *

For all the foregoing reasons we affirm the judgment of the district court.

APPENDIX B

FILED
Clerk U.S. District Court
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District Of Utah
By: ________________
Deputy Clerk

IN THE UNITED STATES COURT FOR THE DISTRICT

OF UTAH

CENTRAL DIVISION

VICTOR JOHNSON,

Plaintiff, ORDER

vs.
Case No. 2:98-CV-550C

MONICA RODRIGUES (OROZCO),
[SEALED DEFENDANTS], and
ADOPTION CENTER OF CHOICE,

Defendants

Plaintiff Victor Johnson's claims in this lawsuit, brought under 42 U.S.C. § 1983, arise from Defendants' actions which, in accordance with the Utah adoption statute, deprived him of notice and the ability to withhold consent before his biological child was given up for adoption. The Defendants are Monica Orozco (the biological mother), Sealed Defendants (the adoptive parents), and the Adoption Center of Choice (collectively, "Defendants"). Johnson contends that application of the Utah adoption statute's notice requirements, as applied to him, violated the Due Process Clause of the Fourteenth Amendment.

This matter is before the court on Johnson's motion for partial summary judgment and on Defendants cross-motion for summary judgment. For the reasons set forth below, the court denies Johnson's motion for partial summary judgment and grants Defendants' cross-motion for summary judgment.

Factual Background

In 1996, in Phoenix, Arizona, Plaintiff Victor Johnson and Defendant Monica Orozco engaged in a brief sexual relationship. Johnson believed that, during that time, Orozco was not engaged in a sexual relationship with anyone else. Johnson considered his relationship with Orozco to be a casual sexual relationship and ended the relationship after a few months. Johnson did not know Orozco's last name during their relationship. Approximately a week after the relationship ended, a friend of Orozco told Johnson that Orozco was pregnant. Together, Johnson and the friend drove to Orozco's house and asked Orozco to take a home pregnancy test that they had purchased at a drugstore. After taking the pregnancy test, Orozco reported that she had made a mistake while administering the test and was unable to obtain an accurate result. At this time, Johnson and the friend believed that Orozco had been lying and was not pregnant.

Approximately three months later, Johnson was informed by another friend, Earl, who was involved in a relationship with Orozco's roommate, Maria, that Orozco was, in fact, pregnant. Johnson did nothing when given this news. The following month, the same friend again told Johnson that Orozco was pregnant.

When Johnson next saw Orozco, when Orozco was four or five months pregnant, Orozco told Johnson that she wanted an abortion. Johnson told Orozco that he would not support her having an abortion, and that he would rather take the child and raise it himself. Johnson went to a police department, explained to an officer that he had gotten Orozco pregnant, and asked how he could take custody of the child. The police officer informed Johnson that there was nothing he could do until the baby was born.

On December 12, 1996, when she was approximately six months pregnant, Orozco contacted Defendant Adoption Center of Choice ("Adoption Center") in Orem, Utah, to explore possibility of placing her baby for adoption once it was born. Maria, who had called several other adoption agencies on behalf of Orozco, told Johnson that Orozco was strongly considering putting the child up for adoption.

When Orozco was, by Johnson's estimation, approximately seven and a half to eight months pregnant, Johnson encountered Orozco at a Phoenix mall. Orozco told Johnson that she had had an abortion, but because it was obvious that Orozco was still pregnant, Johnson did not believe her. Johnson asked Orozco why she hadn't asked him for financial assistance and insisted that he would take care of her financially for the rest of her pregnancy. Orozco responded that Johnson had not helped her earlier in her pregnancy, and that she now wanted nothing to do with him.

After determining that she would put her child up for adoption through the Defendant Adoption Center, Orozco traveled to Utah on February 1, 1997, where she resided in an apartment in Orem, Utah, provided by the Adoption Center. Johnson did not know that Orozco had gone to Utah. On March 5, 1997, Orozco gave birth. The next day, on March 6, Orozco relinquished her parental rights to the Adoption Center at approximately 2:15 p.m. At approximately 3:15 p.m., the Adoption Center looked at the baby's birth certificate and determined that no father had been named and searched the Utah Bureau of Vital Records's punitive father list and found no paternity claims regarding Orozco's baby. Later that day, also on March 6, the Adoption Center placed the infant with its adoptive parents. Johnson was not notified before the baby was placed with its adoptive parents. Orozco left Utah on March 13, 1997, to stay with an aunt in Kenosha, Wisconsin.

In mid-March, 1997, Johnson learned from Maria that the baby had been born. Despite Johnson's questioning, Maria would not tell Johnson where the baby had been born, when it was born, where Orozco was, or what Orozco's last name was.

Johnson then went to Orozco's mother's home in Phoenix, Arizona, to obtain more information about the birth, but was turned away by Orozco's family. On April 15, Johnson again went to Orozco's mother's home and notified Orozco's mother of his intent to file a petition to take custody of Orozco's baby.

On April 17, 1997, the adoptive parents filed a verified petition for adoption in Utah's Fourth District Court. On May 1, 1997, Johnson filed a complaint for paternity and child custody against "Monica Rodriguez" in an Arizona state court located in Phoenix. Johnson did not file a claim of paternity with the Arizona Bureau of Vital Records. A hearing on Johnson's paternity claim was held on June 4, 1997; Orozco, who had not been properly served (the summons was served at the home of Orozco's mother, which is neither where Orozco was then residing or where she was residing during her relationship with Johnson), did not come to the hearing. The Arizona State Court ordered Johnson, Orozco, and Orozco's baby to undergo paternity testing, and set another hearing date of August 5.

On June 12, 1997, Johnson filed a Utah Bureau of Vital Records notice of commencement of paternity proceedings. On

June 13 and 20, 1997, Johnson applied for and received domestic relations subpoenas directed towards the Utah Bureau of Vital Records and the Utah hospital where Orozco's baby was born, in which he requested the birth certificate and other medical information regarding the baby. Johnson also directed a similar subpoena to the adoption Center in late September.

Orozco, who again was not served at her address, did not appear for the August 5 hearing in the Arizona state court. The court issued an order directing the Utah hospital where Orozco's baby was born to release all medical reports regarding the baby to Johnson.

On September 8, 1997, Johnson filed a petition to register the Arizona order in the Fourth District Court of Utah. This order was filed and domesticated in the Utah court on September 18, 1997. On September 23 and 25, 1997, Johnson called the Adoption Center hoping to receive information about the birth of Orozco's baby. Johnson was told by employees of the Adoption Center that the Adoption Center would not provide any information about Orozco or the baby and that there was nothing he could do to contest the adoption. The final decree of adoption in favor of the baby's adoptive parents was issued by the Fourth District Court of Utah on September 24, 1997. Johnson was not made a party to the final adoption proceedings and was not able to contest the adoption.

Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 5 6(c). The party seeking summary judgment bears the initial burden of demonstrating that there is an absence of evidence to support the non-moving party's case. See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). In applying this standard, the court must construe all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Pueblo of Santa Ana v. Kelly, 104 F.3d 1546, 1552 (10th Cir. 1997).

Once the moving party has carried its burden, Rule 5 6(e) "requires the nonmoving party to go beyond the pleadings and by. . . affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324 (quoting Fed. R. Civ. P. 5 6(e)); see also Gonzales v. Millers Cas. Ins. Co., 923 F.2d 1417, 1419 (10th Cir. 1991). The non-moving party must set forth specific facts showing a genuine issue for trial; mere allegations and references to the pleadings will not suffice. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Statutory Background

Johnson does not challenge the facial validity of the Utah adoption statute, Utah Code Ann. §§ 78-30-1 - 78-30-19 (1996 & Supp. 2000), but rather contests whether the statute was constitutionally applied to him. See Johnson v. Rodrigues (Orozco), 226 F.3d 1103 (10th Cir. 2000). "[A] statute fair upon its face may be shown to be void and unenforceable as applied." Ellis v. Social Servs. Dept. of the Church of Jesus Christ of Latter Day Saints, 615 P.2d 1250, 1256 (Utah 1980) (discussing Utah adoption statute). Johnson's as-applied challenge centers around two provisions of the Utah adoption statute. First, Johnson contests the constitutionality of the provision regarding notice of adoption proceedings to biological fathers, as it applied to him. The Utah adoption statute provides that

> [an unmarried biological father is entitled to notice of an adoption proceeding of his child if he] initiate[s] proceedings to establish paternity under Title 78, Chapter 45a, Uniform Act on Paternity, and file[s] a notice of the initiation of those proceedings with the state registrar of vital statistics within the Department of Health prior to the mother's execution of consent or her relinquishment to an agency. That action and notice may also be filed prior to the child's birth.

Utah Code Ann. § 78-30-4.13(3); see also Utah Code Ann. §§ 78-30-4.12(2)(e), 4.12(3)(b), 4.12(3)(e), 4.13(1), 4.13(2)(b) (discussing rights and responsibilities of biological fathers regarding the right to receive notice of an adoption). Johnson concedes that he was not entitled to notice under the terms of the Utah statute itself, as he did not file a claim of paternity with the Utah Bureau of Vital Records before Orozco consented to the baby's adoption (Johnson's claim of paternity was filed on June 12, 1997, more than three months after Orozco executed her consent to the adoption). Johnson contends, however, that because he did not live in Utah and did not know that the baby would be born in Utah, he should not be held to the strict requirements of the Utah adoption statute.

Second, Johnson contests the constitutionality of the provision of the Utah adoption statute regarding a biological father's ability to contest a final adoption proceeding, as applied to him. The statute reads:

> [e]ither relinquishment for adoption to a licensed child-placing agency or consent to adoption is required from.., an unmarried biological father of an adoptee...[if the following requirements are met]:...
>
> (b) With regard to a child who is under six months of age at the time he is placed with adoptive parents, an unmarried biological father shall have manifested a full commitment to his parental responsibilities by performing all of the acts described in this subsection prior to the time the mother executes her consent for adoption or relinquishes the child to a licensed child-placing agency. The father shall:
>
> (i) initiate proceedings to establish paternity...,
>
> (ii) file notice of the commencement of paternity proceedings with the state registrar of vital statistics . . .; and
>
> (iii) if he had actual knowledge of the pregnancy, paid a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his means, and when not prevented from doing so by the person or authorized agency having lawful custody of the child.

Utah Code Ann. § 78-30-4.14(1)(f), (2)(b); see also Utah Code Ann. §§ 78-30-4.12(2)(e), 4.12(3)(b), 4.12(3)(e), 4.14(5), 4.15(2), 4.15(3) (discussing rights and responsibilities of biological fathers with regards to the ability to contest adoption proceeding). Because Johnson did not file his claim of paternity until after Orozco executed her consent to the adoption, Johnson also admits that he was not statutorily entitled to contest the adoption. Again, however, Johnson asserts that out-of-state fathers cannot constitutionally be required to abide by the statute's requirements.

Because Johnson is not a resident of the State of Utah, the statutory provision concerning the rights and responsibilities of out-of-state biological fathers is significant here:

> The Legislature finds that an unmarried biological father who resides in another state may not, in every circumstance, be reasonably presumed to know of, and strictly comply with, the requirements of this chapter. Therefore when all of the following requirements have been met, that unmarried biological father may contest an adoption, prior to finalization of the decree of adoption, and assert his interest in the child; the court may then, in its discretion, proceed with an evidentiary hearing under Subsection 78-30-4.16(2):
>
> (a) the unmarried biological father resides and has resided in another state where the unmarried mother was also located or resided;
>
> (b) the mother left that state without notifying or

> informing the unmarried biological father that she could be located in the state of Utah;
>
> (c) the unmarried biological father has, through every reasonable means, attempted to locate the mother but does not know or have reason to know that the mother is residing in the state of Utah; and
>
> (d) the unmarried biological father has complied with the most stringent and complete requirements of the state where the mother previously resided or was located, in order to protect and preserve his parental interest and right in the child in cases of adoption.

Utah Code Ann. § 78-30-4.15(4). This provision requires a biological father to comply "with the most stringent and complete requirements of the [adoption statute of the] state where the mother previously resided"—in this case Arizona. Arizona law requires unmarried biological fathers to file a claim of paternity with the state registrar of vital statistics within thirty days of his child's birth. See Ariz. Rev. Stat. § 8-106.01. There is no dispute that Johnson did not, and has not, filed such a claim.

Discussion

I. Personal Jurisdiction

Johnson asserts that the Fourth District Court of the State of Utah, which entered the final adoption decree terminating Johnson's parental rights, did not have the authority to enter that decree. Johnson argues that the state courts of Utah did not have personal jurisdiction over him.

Personal jurisdiction analysis is inappropriate in this case, however, because the Fourth District Court did not exercise or seek to exercise personal jurisdiction over Johnson. The Question of personal jurisdiction arises where a defendant is made to defend an action in a court not of his choosing.

> [A] court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum state. The requirement that 'minimum contacts' be present protects a defendant, who has no meaningful contact with a state, from the burdens of defending a lawsuit far from home in a forum where the substantive and procedural laws may be quite different from those
>
> with which the litigant is familiar.

OMI Holdings v. Royal Ins. Co. of Canada, 149 F.3d 1086, 1090 (10th Cir. 1998) (internal citations and quotations omitted) (emphasis added); accord Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1298 (10th Cir. 1999). Here, Johnson was not compelled to defend any lawsuit in the Utah State courts. The fact that the judgment of the Fourth District Court may have affected Johnson's parental rights does not implicate personal jurisdiction.

Moreover, even if personal jurisdiction analysis were appropriate here, it is clear that Johnson voluntarily submitted to and invoked the jurisdiction of the Utah courts when he sought to intervene in the adoption proceedings. See In re Adoption of B.B.D., 984 P.2d 967, 973 (Utah 1999) (holding that father submitted to Utah jurisdiction when he intervened in adoption proceeding in Utah).

II. As-applied constitutionality of Utah's adoption statute

Johnson argues that, because he lived in Arizona and did not know that Orozco was in Utah at the time his child was adopted, he could not have known of his responsibility to comply with the Utah adoption statute. To require out-of-state biological fathers to strictly comply with the requirements of the Utah adoption statute, Johnson contends, deprives those out-of-state fathers of due process of law.

A. Federal case law: Lehr v. Robertson

In Lehr v. Robertson, 463 U.S. 248 (1983), the U.S. Supreme Court addressed the constitutionality of state adoption statutes that require a biological father to take certain affirmative acts before he is entitled to notice of or the ability to contest an adoption. The plaintiff in Lehr—the unmarried biological father of an infant girl—had not supported and rarely visited his daughter during the two years after her birth. Lehr had also failed to file a claim of paternity with the New York putative father registry. Because the New York adoption statute required a biological father to file a claim of paternity prior to the commencement of adoption proceedings, Lehr did not receive notice of and was not granted the ability to contest the subsequent adoption of his child. Lehr filed suit against the birth mother, claiming that the Due Process Clause of the Fourteenth Amendment gave him an absolute right to notice and an opportunity to be heard before his child could be adopted.

The Supreme Court disagreed. Although it recognized that the relationship between parent and child merits constitutional protection, it stressed that

> it by no means follows that each unwed parent has any such right. Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.... When an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the due process clause. At that point it

> may be said that he acts as a father toward his children. But the mere existence of a biological link does not merit equivalent constitutional protection. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.

Id. at 260-62 (internal quotations and citations omitted) (emphasis in original).

In this case, Johnson failed to demonstrate a full commitment to the responsibilities of parenthood prior to the birth of his child. It is undisputed that Johnson knew Orozco was pregnant and that Johnson believed that he had fathered the child. Despite this, Johnson did not carry on a relationship with Orozco, did not provide any financial support to Orozco, and did not offer such support until a chance encounter one month before the baby was born. Johnson also knew that Orozco was considering putting the baby up for adoption. In spite of this, Johnson did not file a claim of paternity with either the Utah or the Arizona Bureaus of Vital Records before the commencement of adoption proceedings. As the Supreme Court commented in Lehr, "the right to receive notice was completely within [the biological father's] control. By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt [his child]." Lehr, 463 U.S. at 264. Johnson, however, did not grasp this opportunity.

Johnson claims that he should not be required to comply strictly with the requirements of the Utah adoption statute because neither he nor Orozco lived in Utah before the baby's birth and because he did not know that Orozco had traveled to Utah to give birth to the child. This does not explain, however, Johnson's failure to provide financial support to Orozco or to otherwise prepare for the responsibilities of parenthood while both were in Arizona. And while Johnson cannot be expected to have known that he needed to file a claim of paternity in Utah, this does not explain his failure to file a claim of paternity in Arizona, especially since Johnson did not have reason to believe that Orozco had left Arizona.

Admittedly, Johnson did demonstrate a desire to take custody after the baby had been placed with adoptive parents and the adoption proceedings had commenced: he tried to gain information about the baby's birth from Orozco's friends and family, filed a complaint for paternity in Arizona, had the judgment registered in the Utah courts, filed a claim for paternity with the Utah Bureau of Vital Records, and tried to obtain medical records concerning the birth from various Utah sources. The Utah adoption statute, however, clearly requires that such actions take place before the mother gives consent for adoption. Johnson essentially asks this court to find that he sufficiently complied with the purpose of the statute by performing these actions after consent was given, rather than before.

The Utah legislature chose the date of consent as the cut-off date for a biological father to assert his parental rights only after a careful balancing of the interests of a biological father with those of the mother, adoptive parents, and child:

> The Legislature finds that:
>
> (a) the state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner, in preventing the disruption of adoptive placements, and in holding parents accountable for meeting the needs of children;
>
> (b) an unmarried mother, faced with the responsibility of making crucial decisions about the future of a newborn child, is entitled to privacy, and has the right to make timely and appropriate decisions regarding her future and the future of the child, and is entitled to

> assurance regarding the permanence of an adoptive placement;
>
> (c) adoptive children have a right to permanence and stability in adoptive placements;
>
> (d) adoptive parents have a constitutionally protected liberty and privacy interest in retaining custody of the adopted child; and
>
> (e) an unmarried biological father has an inchoate interest that acquires constitutional protection only when he demonstrates a timely and full commitment to the responsibilities of parenthood, both during pregnancy and upon the child's birth. The state has a compelling interest in requiring unmarried biological fathers to demonstrate that commitment by providing appropriate medical care and financial support and by establishing legal paternity, in accordance with the requirements of this chapter.

Utah Code Ann. § 78-30-4.12(2). To promote these interests, the Legislature established specific categories of persons that are entitled to notice and to withhold consent to an adoption, a list which includes biological fathers who have complied with the statutory requirements. See Utah Code Ann. § 78-30-4.13(2). To allow biological fathers who have not complied with the statutory requirements to nevertheless contest adoptions in the courts, as the Supreme Court has recognized, would threaten the private interests of mother, adoptive parents, and child. See Lehr, 463 U.S. at 264 ("The New York legislature concluded that a more open-ended notice requirement would merely complicate the adoption process, threaten the privacy interests of unwed mothers, create the risk of unnecessary controversy, and impair the desired finality of adoption decrees."). The Utah Supreme Court has similarly held that allowing biological fathers who have not met the statutory preconditions to nonetheless contest adoptions would not be in the best interest of the children involved:

> The damage done by the actual and potential disruption of the adoption system by protracted litigation of such cases would be especially incalculable as to the children involved. The harm caused to infants, who need stable relationships with adults for the psychological bonding necessary for their well-being and character development, could be incurable.

Sanchez v. L.D.S. Soc. Servs., 680 P.2d 753, 755 (Utah 1984). The Utah State Legislature has determined, after carefully weighing the interests of those affected by an adoption, that a biological father must assert his parental rights before the mother has given consent for the baby to be adopted. This court will not substitute its own judgment for that of the Utah State Legislature and proclaim that a biological father who has performed such actions after consent has been given may overturn the adoption of his biological child.

B. Utah case law

This perspective conforms with the Utah Supreme Court's decisions on this subject. In cases where the biological father of an adopted child failed to comply with the strict requirements of the Utah adoption statute, the Utah Supreme Court has asked whether the father was afforded a "reasonable opportunity to comply with the [notice requirements of the Utah adoption] statute" Ellis 615 P.2d at 1256 (referring to Utah Code Ann. §78-30-4.13(3)). "[T]he reasonable opportunity standard applies only where it is 'first shown that it was 'impossible' for the father to file 'through no fault of his own.'"' In re Adoption of Baby Boy Doe 717 P.2d 686, 689 (Utah 1986), quoting Ellis, 615 P.2d at 1256. Utah law makes clear that the biological father does not need to show that it was physically "impossible" for him to comply with the statutory requirements of filing a petition of paternity before the adoption proceedings commence, only that he could not have foreseen of the need to do so. "[W]here a father does not know of the need to protect his rights, there is no 'reasonable opportunity' to assert or protect parental rights. In such a case, the operation of the statute fails to achieve the desired balance and raises serious due process concerns." Id. at 691.

Applying this standard, the Utah Supreme Court has repeatedly rejected as-applied challenges when a biological father did have a "reasonable opportunity" to file a claim of paternity. In Sanchez, for example, the mother and biological father lived together, and, when the mother became pregnant, she informed the father that she intended to put the baby up for adoption. After the baby was born, the father visited the mother and baby in the hospital and was told that the baby would immediately go to the adoptive parents, but he did not protest the adoption. The next day, the father had a change of heart and registered his name with the Bureau of Vital Records. The court held that the father's failure to strictly comply with the Utah adoption statute, which required that he register his name before the adoption proceedings began, meant that his lack of notice was not unconstitutional. See Sanchez, 680 P.2d at 755-56.

In Sanchez, the biological father resided in Utah and was therefore presumed to know the requirements of the Utah adoption statute. See id. at 755. In the most recent case on this issue, In re Adoption of B.B.D., 984 P.2d 967 (Utah 1999), however, the court held that an out-of-state father was not excused from complying with the requirements of the Utah adoption statute. There, the mother and father both lived in Washington state, and the father knew that the mother was pregnant and was planning on having the baby in Utah and putting it up for adoption there. The father failed, however, to establish legal paternity under Utah law by registering with the Utah Bureau of Vital Records. The court held that requiring the father to strictly comply with the statutory requirements did not violate his right to due process. See B B D 984 P.2d at 971-72; accord Swayne v. L.D.S. Soc. Servs., 795 P.2d 637 (Utah 1990) (due process not violated by requiring unmarried biological father to file acknowledgment of paternity before he is entitled to rights of notice and consent); In re Adoption of W., 904 P.2d 1113 (Utah Ct. App. 1995) (same); Beltran v. Allan, 926 P.2d 892 (Utah Ct. App. 1996) (same, out-of-state father).

In three cases, Utah courts have held that the biological father had not been given a reasonable opportunity to comply with the adoption statute and ruled in favor of the biological father. In Ellis the baby's parents resided in California. The parents had been engaged to be married, but the mother broke off the engagement shortly before the wedding. A few days before the birth of the child, the child's mother moved to Utah without the father's knowledge, gave birth to the baby, and put it up for adoption. The father, still in California, learned of the birth of the baby and within two days of the commencement of adoption proceedings, contacted the adoption agency to let it know that he was the father and that he intended to assert his parental rights. Approximately two weeks later, the father filed a claim of paternity. See Ellis 615 P.2d at 1252-53. The Utah Supreme Court held that, under these circumstances, the trial court had not given [the father] an opportunity to present evidence to show as a factual matter that he could not reasonably have expected his baby to be born in Utah." See id. at 1256. Similarly, in Baby Boy Doe, the baby had been conceived in California, but the mother moved to Utah while she was pregnant. When the mother told the father that she was considering putting the baby up for adoption, the father said that he was opposed to the idea and that he wanted to raise the child. The mother and father then made plans to move to Arizona, get married, and raise the child together. While the father was moving their possessions from California to Arizona, the mother gave birth to the child and, under pressure from her relatives, put the baby up for adoption. See Baby Boy Doe. 717 P.2d at 687-88. The court - relying on the fact that the father made clear his intention to raise the child, that the father did not know that the baby would be put up for adoption, that the father had taken affirmative steps to begin to support and raise the child, and that the mother's family had deliberately withheld information from the father - ruled in favor of the father. See id. at 690. Most recently, in In re Adoption of S.L.F., No. 990750-CA, 2001 WL629679 (Utah Ct. App. June 7, 2001), the Utah Court of Appeals held that a father was entitled to intervene in an adoption proceeding because he had, among other things, given the mother money during her pregnancy, and purchased clothing, diapers, a changing table, and other items for his child.[1]

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[1] The baby in In re Adoption of S.L.F. was over six months old when adoption proceedings were commenced, raising a different set of requirements for a biological father seeking to intervene in the child's adoption. See Utah Code Ann. § 78-30-4.14(2)(a). For biological fathers of children older than six months, a biological father is not required to have filed a notice of paternity; he is, however, required to have "developed a substantial relationship with the

But the facts of this case are analogous to those of Sanchez and B.B.D., not those of Ellis,Baby Boy Doe, and S.L.F.. Like the fathers in Sanchez and B.B.D., in which the Utah Supreme Court upheld the as-applied constitutionality of the Utah adoption statute, the father in this case, Johnson, knew the mother was pregnant, believed that he was the father of the child, and knew that the mother was considering putting the child up for adoption. Unlike the fathers in Ellis Baby Boy Doe, and S.L.F., Johnson did not carry on a relationship with Orozco during her pregnancy, took no affirmative steps to prepare for raising the child, and provided no significant financial support to Orozco during her pregnancy. Most importantly, in Ellis and Baby Boy Doe, the mothers' decisions to move to Utah and put their babies up for adoption were unexpected, occurred just days before the babies' births, and could not have been foreseen by the biological fathers. Here, however, Johnson knew months before the baby's birth that Orozco planned to put the baby up for adoption. Despite this knowledge and this available time, Johnson did not

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child" as demonstrated by financial support and regular visits or communication with the child. See Utah Code Ann. § 78-30-4.14(2)(a).

register—either with the Utah or the Arizona Bureau of Vital Records—his claim to paternity of the child. The fact that Johnson may not have known that the adoption would take place in Utah is not significant because, as discussed above, Johnson could have registered with the Arizona Bureau of Vital Records in order to protect his rights.

Accordingly, the court concludes, based on federal and Utah law, that application of the Utah adoption statute in this case did not violate the Plaintiffs right to due process. Johnson's motion for partial summary judgment on his constitutional claims is denied; Defendants' cross- motion for summary judgment on these claims is granted.

III. Parental Kidnaping Prevention Act

The second claim asserted by Johnson is that, by allowing his biological child to be adopted without his consent, Defendants violated the Parental Kidnaping Prevention Act ("PKPA"), 28 U.S.C. § 1738. The PKPA imposes a duty on the States to enforce a child custody determination entered by a court of another State if the determination is consistent with the provisions of the Act. Congress intended the PKPA to have the same operative effect as a full faith and credit statute for child custody determinations. See Thompson v. Thompson, 484 U.S. 174, 182 (1988). ft is unclear how the PKPA would apply to the facts of this case, however, because Johnson has never had a child custody determination in his favor entered in any court. Although the judgments of the Arizona state court were in Johnson's favor, these judgment did not relate to child custody but rather to paternity testing and the release of medical records.

Moreover, the Utah courts entered a final adoption decree on September 24, 1997, giving custody of Johnson's biological child to the child's adoptive parents. The PKIPA does not create a private cause of action in federal court to determine which of two conflicting state custody decrees is valid. See id. at 187; Wigington v. McCarthy, No. 96-7134, 1997 WL 527636, at *3 (10th Cir. Aug. 27, 1997). Even if an Arizona court had entered a custody decree in favor of Johnson, therefore, Johnson would not have a right of action under the PKPA to contest the Utah adoption decree.

Accordingly, Defendants' motion for summary judgment on Johnson's PKPA claim is granted.

IV. Intentional infliction of emotional distress

Johnson also brings a claim for intentional infliction of emotional distress. Specifically, Johnson alleges that: (1) when he contacted the Adoption Center by phone in September 1997, an employee of the Adoption Center expressed doubt as to Johnson's financial ability to bring a lawsuit against the Adoption Center; (2) after Johnson obtained the names of the adoptive parents from the Adoption Center and called the adoptive parents, the adoptive parents called the police and the police came to Johnson's residence to instruct him to stop "harassing" the adoptive parents; (3) Orozco and the Adoption Center completed the adoption of Johnson's biological child without notifying him; and (4) the Adoption Center purposefully withheld information from Johnson that would have allowed Johnson to contest the adoption.

Under Utah law, in order to prove a claim for intentional infliction of emotional distress, a plaintiff must demonstrate the following three elements:

> (a) that the defendant intentionally engaged in some conduct toward the plaintiff considered outrageous and intolerable in that it offends the generally accepted

> standards of decency and morality (b) with the purpose of inflicting emotional distress or where any reasonable person would have known that such would result, and (c) that severe emotional distress resulted as a direct result of the defendant's conduct.

Russell v. Thomson Newspapers, Inc., 842 P.2d 896, 905 (Utah 1992). The question of whether a defendant's alleged conduct meets these requirements is a legal question for the court to resolve. See DeBry v. Godbe, 992 P.2d 979, 986 (Utah 1999); Matthews v. Kennecott Utah Copper Corp., 54 F.Supp. 2d 1067, 1075 (D. Utah 1999) (applying Utah law). In order to demonstrate "outrageous and intolerable" conduct, the plaintiff must show "extraordinarily vile conduct, conduct that is 'atrocious, and utterly intolerable in a civilized community.'" Retherford v. AT&T Communications of the Mountain States, Inc., 844 P.2d 949, 977 n.19 (Utah 1992), quoting Restatement (Second) of Torts § 46, cmt. d (1965). "The liability [for intentional infliction of emotional distress] clearly does not extend to mere insults, indignities, threats, [or] annoyances..." Restatement (Second) of Torts § 46, cmt. d (1965).

With regards to Johnson's first two allegations, the court concludes that these alleged actions do not rise to the level of "outrageous and intolerable" conduct. Insinuating that Johnson did not have the financial means to pay for a lawsuit, while perhaps insulting, does not constitute "extraordinarily vile conduct." Retherford, 844 P.2d at 977 n.19. And the evidence in this case suggests that the adoptive parents called the police to report Johnson only after Johnson had called them several times pretending to be someone else. (~ Aff of Adoptive Mother ¶¶~J 3-6, attached as Ex. 1 to Defs.' Reply Mem. in Supp. of Cross-Mot. for Summ. J.;Aff. of Adoptive Father¶¶ 3-6, attached as Ex. 1 to Defs.' Reply Mem. in Supp. of Cross-Mot. for Summ. J.) Even if the adoptive parents had inexplicably reported Johnson to the police for no reason, such would not rise to the level of "outrageous and intolerable" conduct—as Johnson was only embarrassed and "pissed off" by the unexpected police visit. (See Pl.'s Response to Def.'s Cross-Mot. for Summ. J. at 6 (citing Johnson Dep. at 164)).

Johnson's final two allegations — that the Defendants did not notify him of the adoption of his child and withheld information from him about the pending adoption — cannot be considered "outrageous and intolerable" under Utah law.

Defendants, by withholding information about the adoption from Johnson, an individual who was, under Utah's adoption statute, not entitled to receive that information, appear only to have followed their statutory obligations. As discussed above, the obligations created by the Utah adoption statute are not unconstitutional and protect the interests of biological fathers so long as those biological fathers demonstrate their commitment to their children by following certain statutory preconditions. Defendants' actions in conformity with this statute, therefore, cannot be said to be "outrageous and intolerable" under Utah law.

Accordingly, Defendants' cross-motion for summary judgment on Johnson's intentional infliction of emotional distress claim is granted.

V. Tortuous interference with family relationships

Finally, Johnson asserts a cause of action for "tort[i]ous interference with family relationships." (See Compl. at §§ 6.1 - 6.4.) There is some doubt as to whether such a cause of action exists at all under Utah law.[2] Even assuming, without holding, that such a cause of action exists, however, it appears from the facts of this case that Johnson would be unable to bring such an action. As discussed above, the Supreme Court has emphasized that "[p]arental rights do not spring full-blown from the biological connection between parent and child... [but rather] require relationships more enduring." Lehr, 463 U.S. at 260, ciuotin~ Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., concurring) (citations omitted). As discussed at length in this decision, Johnson did not attempt to create any sort of family relationship with Orozco before the child's birth, and his claim of paternity was filed only after the baby had already been born and placed with its adoptive parents. Johnson's connection with the baby, at least before the baby's birth, was biological only.. Under these circumstances, it cannot be said that

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[2] The Utah cases cited by Johnson fail to support such a cause of action. Norton v. MacFarlane 818 P.2d 8 (Utah 1991) and Jackson v. Richter 891 P.2d 1387 (Utah 1995) involved the tort of alienation of affection, which requires damage to a "marriage or conjugal relationship." MacFarlane 818 P.2d at 15. In Johnson v. Rogers 763 P.2d 771 (1988), the court's statement that "[v]irtually all jurisdictions in the United States now recognize a broad protected interest in mental tranquility" appeared in a discussion of whether to extend the tort of negligent infliction of emotional distress to bystanders; that case did not specifically address the cause of action claimed here. Id. at 779. See also 59 Am.Jur.2d Parent and Child § 92 (1987) ("The cases generally indicate that a parent has no right of action for alienation of his child's affections...").

Defendants' actions could have represented interference with any constitutionally protected "family relationship."

Accordingly, Defendants' motion for summary judgment on Johnson's claim for "tortuous interference with family relationships" is granted.

Order

Plaintiff Victor Johnson's motion for partial summary judgment is DENIED; Defendants' cross-motion for summary judgment is GRANTED.

DATED this 13 day of June, 2001.

BY THE COURT:

TENA CAMPBELL
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

VICTOR JOHNSON,
Plaintiff-Appellant,
No. 01-41 56
v.

MONICA RODRIGUES (OROZCO);
SEALED DFT-98-550-1; SEALED DFT
98-550-2, and ADOPTION CENTER OF
CHOICE,

Defendants-Appellees.

ORDER

Filed July 31, 2002

Before TACHA, Chief Judge, ALDISERT[1], and SEYMOUR, Circuit Judges.

Appellant's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

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[1] Ruggero J. Aldisert, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

Appellee Adoption Center of Choice's Bill of Costs is granted in the amount of $462.58 (for the copying and binding of its briefs and supplemental appendix). The additional costs requested by Appellee are not reimbursable under Fed. R. App. P. 39. The cost of preparation of transcripts is taxable in the district court pursuant to Fed. R. App. P. 39(e)(2). Courier fees are part of the attorney's overhead for handling the appeal, rather than being reimbursable as a Rule 39 cost. See generally In re Penn Central Transp. Co., 630 F.2d 183, 191-92 (3d Cir. 1980); Chemical Mfrs. Ass'n v. U.S.E.P.A., 885 F.2d 1276, 1278 (5th Cir. 1989) ("As used in Rule 39, 'costs' merely refers to the expenses of docketing an appeal or preparing and filing briefs and records.").

Entered for the Court

PATRICK FISHER, Clerk of Court

by: ____________________

Deputy Clerk

APPENDIX D

FILED
United States Court of Appeals
Tenth Circuit

August 28 2000

Patrick Fisher
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

VICTOR JOHNSON,

Plaintiff - Appellant,

v.

No. 99-4127

MONICA RODRIGUEZ (OROZCO);
SEALED DEFENDANT-98-550-1;
SEALED DEFENDANT-98-550-2;
ADOPTION CENTER OF CHOICE,

Defendants - Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

(D.C. No. 98-CV-550-C)

C. Robert Collins, Phoenix, Arizona for Appellant.

Constance K. Lundberg, Brigham Young University Law School, Provo, Utah, and Karra J. Porter, Christensen & Jensen, P.C., Salt Lake City, Utah, (G. Murray Snow, Osborn Maledon, P.A., Phoenix, Arizona, and Jay E. Jensen, Christensen & Jensen, P.C., Salt Lake City, Utah, with them on the brief) for Appellees.

Before TACHA, HOLLOWAY and BALDOCK, Circuit Judges.

HOLLOWAY, Circuit Judge.

Plaintiff Victor Johnson (Plaintiff) brought this action under federal question jurisdiction and as a diversity case, seeking declaratory relief and citing 28 U.S.C. § 1331 and 1332 (a) (1) and the declaratory judgment act. He asserted that Utah's adoption statutes unconstitutionally denied him — the purported father of a child whose adoption had been obtained in Utah — notice and an opportunity to be heard. Plaintiff also asserted a claim for intentional infliction of emotional distress against defendant Monica Rodrigues, alleged to be the child's mother, and the Adoption Center of Choice (Defendants). Defendants Adoption Center of Choice and Defendants adoptive parents, who were joined as defendants, moved to dismiss Plaintiff's action or in the alternative for summary judgment, arguing that the district court lacked subject matter jurisdiction under the Rooker-Feldman doctrine.[1] See District of Columbia Court of Appeals v.Rooker-Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415-16 (1923). The district court granted Defendants' motions.[2] Plaintiff timely appeals. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291. For reasons that follow we affirm in part, reverse in part, and remand for further proceedings.

I

The case began in the United States District Court for the District of Utah where Plaintiff Victor Johnson filed his complaint against Monica Rodrigues (Orozco), an unnamed Utah husband and wife, and a Utah adoption agency, Adoption Center of Choice. App. at 11-12. The complaint averred that jurisdiction lies under the diversity statute, 28 U.S.C. § 1332, the federal question statute, 28 U.S.C. § 1331, and the declaratory judgment act. The complaint alleges that the issues relate to the Due Process Clause of the United States Constitution and that the Plaintiff challenges the constitutionality of the adoption statutes of the State of Utah as they apply to a non-resident of Utah, here a resident of the State of Arizona. App. at 11. The complaint alleges also the Plaintiff's residence to be in Phoenix and that his domicile is Arizona. It avers that the residence of Defendant Monica Rodrigues (Orozco) was unknown but that her last known address was in Orem, Utah and Plaintiff also alleged it was his belief that Defendant Rodrigues remains in a state other than Arizona or Utah. App. at 12. It was averred also that an unnamed adoptive husband and wife are Defendants who have been residents of Utah during all material times and that the Defendant Adoption Center of Choice is a Utah adoption agency with its principal place of business in Orem, Utah. The complaint further alleged that Plaintiff and Defendant Rodrigues conceived a child in Arizona, referred to as "Baby Orozco," who was born at the Orem Community Hospital in Orem, Utah; and that Defendant Rodrigues had previously informed Plaintiff that she was pregnant but had had an abortion during her first trimester. App. at 12-13. In discussions with Defendant Rodrigues' friends on about May 1, 1997, Plaintiff learned that he may be the father of a daughter by Defendant Rodrigues. Plaintiff therefore filed a petition in the Maricopa County, Arizona, Superior Court for determination of paternity and custody. That court ordered Defendant Rodrigues and Baby Orozco to submit to DNA testing.

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[1] During a hearing on motions on May 7, 1999 in the district court, App. 74, 78, the judge ordered that a copy of the decree for adoption, which the adoptive parents attached to their pleadings, be sealed. That order was not challenged below and no issue about the sealing order is raised on appeal. Id. at 78. We treat that the decree and the identities of the adoptive parents to be concealed as ordered below.

[2] The district court stated various grounds for granting Defendants' motion for summary judgement or motion to dismiss. See App. At 68 ("[F]or the reasons [orally] set forth at the close of the hearing, the court finds that it lacks subject matter jurisdictions and dismisses plaintiff's complaint. Therefore, defendant Adoption Center of Choice's motion for summary judgement or abstention is GRANTED, defendants [unnamed adoptive parents] motion to dismiss or for summary judgement is GRANTED. . .").

The complaint stated that on June 16, 1997, Plaintiff was informed that Baby Orozco was in Utah and that Plaintiff was required by Utah law to be registered with the Utah State Register of Vital Statistics, which Plaintiff immediately did. The complaint averred that a commissioner of the Maricopa County Superior Court in Arizona made findings that Defendant Rodrigues gave birth to a baby girl on March 5, 1997 in Utah; that the father had made several attempts to gain information about the minor child, believed to be the child of Plaintiff because of an intimate relationship the parties had during the time of conception; and that the possibility of an adoption of the minor by Plaintiff was creating difficulty for Plaintiff in obtaining any information regarding the child. App. at 13.

By use of a Utah subpoena, Plaintiff obtained records which made it appear there was a pending adoption proceeding in Utah for Baby Orozco,[3] but Plaintiff alleges he was unable to learn about the court case number or the judge involved. App. at 14. The medical records contained documents for "authorization for release of a child to a Designated Person." The person to whom the child was released was an employee of Defendant Adoption Center of Choice. The Center received court orders sent by Federal Express regarding the child which contained a letter from Defendants, the adoptive husband and wife. Plaintiff called Defendant Adoption Center of Choice and spoke with a "Rosemary" about the adoption; she indicated nothing could be done and that further information would not be provided, according to the complaint.

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[3] Defendants adoptive parents' counsel made arguments at the motion hearing of May 7, 1999 contradicting Plaintiffs Johnson's averments about his inability to pursue his rights. In making her jurisdictional dismissal ruling, the district judge made no factual findings on these conflicting positions. Counsel argued that Plaintiff could have filed a petition to intervene in the Utah adoption proceeding for three months before the adoption became final. App. at 89. In our review of the dismissal of the complaint, we must view the complaint's allegations in the light most favorable to Plaintiff Johnson, as noted below.

The Arizona statutes involved are alleged to be Ariz. Rev. Stat. §25-401, et seq. App. at 18. The complaint stated that the relevant adoption statutes of Utah are Utah Code Ann., § 78-30-4.11 et seq. It was alleged that the latter statute, as applied or on its face, without due process of law deprived Plaintiff of his fundamental right to maintain a parent-child relationship in that the statute does not require the mother to produce the name of a possible father. It was averred that a due process violation occurred also because once "actual notice of the father's right is given to the adoption agency there is no duty on the adoption agency as agent for the adoptive parents to disclose information or [provide] notice of the proceedings to the father." In connection with this alleged violation of Plaintiff's rights, the complaint cites the "Kidnaping Act 28 U.S.C. § 1738." App. at 21-22.

The complaint also alleged a cause of action for intentional infliction of emotional distress. The Plaintiff requested relief to enforce the Arizona court orders, to command Defendants to produce the baby for DNA testing, to return the baby to plaintiff, to declare void the decree of adoption issued by the Utah courts, and to "declare the Utah State Adoption Laws invalid," inter alia. App. at 23.

Defendant Adoption Center of Choice moved for summary judgment or abstention. App. at 44-45. Defendants, the adoptive parents, moved for dismissal of the complaint and also joined in the motion for summary judgment submitted by the co-defendant, Adoption Center of Choice. App. at 46-47. An order of the District Judge, following a hearing on several motions, stated that Defendant Monica Rodrigues did not appear. App. at 67-68. That order of May 11, 1999 stated that the court found it lacked subject matter jurisdiction and dismissed the Plaintiff's complaint, stating that the Adoption Center of Choice's motion for summary judgment or abstention was granted, the unnamed adoptive parents' motion to dismiss or for summary judgment was granted, and Plaintiff's motion for partial summary judgment was denied. App. at 68.

At the hearing which resulted in that May 11, 1999 order, the District Judge stated she was going to dismiss the case because she concluded she did not have subject matter jurisdiction; that the Plaintiff's remedy when challenging an adoption in the state court system was to bring an action in the state court for some sort of collateral relief, either alleging fraud or, as the judge understood it, the unconstitutionality of the statute; and that under Anderson v. Colorado, 793 F.2d 262 (10th Cir. 1986), federal district courts are without authority to review state court judgments where the relief sought is in the nature of appellate review. The judge said that the Plaintiff's claims were essentially seeking to undo the adoption decision of the Utah state court, and therefore his case "fits squarely within the parameters of the Doe-Feldman doctrine which prohibits me, a federal district court, from reviewing the state court judgment." App. at 93-94.

Plaintiff Johnson filed a notice of appeal from the judgment of May 17, 1999 dismissing his complaint for lack of subject matter jurisdiction. App. at 70-71.

II

Whether the district court had subject matter jurisdiction is a legal question which we review de novo. See Sac and Fox Nation of Missouri v. Pierce, 213 F.3d 566, 571 (10th Cir. 2000)

("The district court's determination of subject matter jurisdiction is a question of law which we review de novo.").

Title 28 U.S.C. § 1331 vests the federal district courts with "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1332 (a) provides that the "district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States." 28 U.S.C. § 1257, in turn, provides that "final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari." Because these jurisdictional statutes provide for appellate review of state court decisions, like the one in question here, in the United States Supreme Court, the statutes prevent a federal district court from entertaining a challenge to a state court's judgment, see Rooker, 263 U.S. at 415-16, or a challenge that is "inextricably intertwined" with such a judgment. See Feldman, 460 U.S. at 486-87.

Plaintiff argues that he is not seeking appellate review of the state court's decision, pointing out that he was not a party to the adoption proceeding in Utah. See Appellant's Brief in Chief at 9. He argues that he requested information from Appellees so that he could become a party; that the Appellees "stonewalled" Plaintiff following that request; and that the parties to this appeal have never litigated to final judgment any of the issues raised in the instant complaint in the District Court; and therefore that court could not act as an appellate court. Id. In the posture of the case as it comes to us, we must accept these averments. We are reviewing a dismissal and must read the complaint liberally, construing all reasonable allegations in the Plaintiff's favor. Skrzypczak v. Kauger, 92 F.3d 1050, 1053 (10th Cir. 1996). As the Supreme Court has long instructed us, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief . . ." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote and citations therein omitted). Essentially the same review must be given to the decision, viewed as a summary judgment. McGarry v. Bd. of County Comm'rs of Pitkin County, 175 F.3d 1193, 1198 (10th Cir. 1999).

We are persuaded that the district court erred in dismissing Plaintiff Johnson's complaint under the Rooker-Feldman doctrine for two basic reasons. First, he was not a party to the state court adoption proceeding, a fact which makes the doctrine inapplicable. And, second, Plaintiff's discrete general challenge to the validity of the Utah adoption laws must be considered, thus distinguishing this case from one challenging the merits of a particular state court ruling. Under the Rooker-Feldman doctrine, federal district courts

> have subject matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case. They do not have jurisdiction, however, over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in this Court. 28 U.S.C. § 1257.

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983).

The Court's opinion in Feldman noted specifically that our court in Doe v. Pringle, 550 F.2d 596, 597 (10th Cir. 1976), had correctly focused on the nature of a suit seeking review of a state court's ruling on a particular application for admission to the bar, where jurisdiction is lacking and review must be sought in the Supreme Court. On the other hand, the federal district courts do have jurisdiction "over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state court judgment in a particular case." Feldman 460 U.S. at 486 (emphasis added). We are convinced that under this principle the federal district court in the instant suit did have jurisdiction over the discrete portion of Plaintiff Johnson's complaint herein in which he made a general challenge to the Utah adoption laws and separately asked that the district court "Declare the Utah State Adoption laws invalid." Complaint, ¶ X-G, App. at 24. The latter portion of Plaintiff's case comes within the distinction clearly noted in Doe v. Pringle, 550 F.2d at 599, that "a federal district court may exercise review of alleged federal constitutional due process or equal protection deprivations in the state's adoption and/or administration of general rules governing admission." Thus in light of the general challenge by Plaintiff Johnson to the Utah Adoption laws it was error to dismiss Plaintiff's complaint in toto since that portion of his complaint need not be construed as an attempt to appeal a particular adoption decree.

There is the second ground mentioned earlier which bars application of the Rooker-Feldman doctrine here — namely the admitted fact that Plaintiff Johnson was not a party to the Utah Adoption proceeding which the Defendants say he seeks to collaterally attack. Plaintiff Johnson objected below on this ground to application of the Rooker-Feldman doctrine, his counsel stating: "First off, Mr. Johnson was not a party to that [state court] action." App. at 81. Construing the complaint before the District Judge as we must, we agree with Plaintiff that the Rooker-Feldman doctrine was not applicable here for this reason. The complaint's allegations and this record in no way show that Plaintiff was a party to the proceedings in Utah. To the contrary, the allegations before the District Court here, which must be accepted at this juncture in reviewing a dismissal, were instead that Plaintiff sought information to assert his rights and was told on September 24, 1997 by the Adoption Center's Director that the adoption had become final that day and that "there was nothing Plaintiff could do." App. at 14-15.

This makes instructive the Supreme Court's decision in Johnson v. De Grandy, 512 U.S. 997 (1994). There the Florida Supreme Court had declared constitutional Florida's reapportionment of house districts based on the 1990 census. See id. at 1001. The United States did not participate in the state proceeding. After the Florida Supreme Court's decision, the United States filed an action in the federal district court challenging Florida's redistricting plan. See id. at 1002. Florida argued that the Rooker-Feldman doctrine barred the United States' federal action. See id. at 1005. The Supreme Court rejected the argument:

> [The State] contends . . . that the Federal Government's § 2 challenge deserved dismissal under this Court's Rooker/Feldman abstention doctrine, under which a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights . . .but the invocation of Rooker/Feldman is just as inapt here, for unlike Rooker or Feldman, the United States was not a party in the state court. . . . The United States merely seeks to litigate its § 2 case for the first time, and the Government's claims, like those of the private plaintiffs, are properly before the federal courts.

Id. at 1005-06 (emphasis added) (citations omitted).

As Johnson teaches, the Rooker-Feldman doctrine should not be applied against non-parties. Other circuits have thus construed Johnson. See Gross v. Weingarten, 217 F.3d 208, 218 n. 6 (4th Cir. 2000) (citing Johnson, 512 U.S. at 1005-06, and holding that "Rooker-Feldman does not apply, however, when the person asserting the claim in the federal suit was not a party to the state proceeding"); Bennett v. Yoshina, 140 F.3d 1218, 1224 (9th Cir. 1998) (citing Johnson, 512 U.S. at 1005-06, and holding that "since the new plaintiffs were not parties to the state suit, their suit is not barred by the Rooker/Feldman doctrine"); Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1351 (7th Cir.1996) (citing Johnson, 512 U.S. at 1005-06, and holding that "[w]e, too, have held that the Rooker-Feldman doctrine does not affect suits by or against persons who were not parties to the initial case"); Roe v. Alabama, 43 F.3d 574, 580 (11th Cir. 1995) (citing Johnson, 512 U.S. at 1005-06, and holding that the Rooker-Feldman doctrine did not bar the action because "the plaintiffs in this case [were] not, by the admission of all parties, parties to [the state action]. The Rooker-Feldman doctrine does not apply to such circumstances"); see also E.B. v.Verniero, 119 F.3d 1077, 1092 (3d Cir. 1997) ("Rooker-Feldman does not bar individual constitutional claims by persons not parties to the earlier state court litigation."); United States v. Owens, 54 F.3d 271, 274 (6th Cir. 1995) ("The Rooker-Feldman doctrine does not apply to bar a suit in federal court brought by a party that was not a party in the preceding action in state court").

We are convinced that the Rooker-Feldman doctrine does not bar a federal action when the plaintiff, as here, lacked a reasonable opportunity to litigate claims in the state court. See Dale v.Moore, 121 F.3d 624, 626 (11th Cir. 1997) ("The Rooker-Feldman doctrine applies as long as the party had a reasonable opportunity to raise his federal claims in the state court proceedings. If the party had no reasonable opportunity, this court considers that the federal claim was not inextricably intertwined with the state court's judgment.") (citation and internal quotation marks omitted); Ernst v. Child & Youth Services of Chester County, 108 F.3d 486, 492 (3d Cir. 1997) (same); Moccio v. New York State Office of Court Admin., 95 F.3d 195, 199, 202 (2d Cir. 1996) (same); Guess v. Bd. of Med.

Exam'rs of North Carolina, 967 F.2d 998, 1004 (4th Cir. 1992) (similar). A person would ordinarily lack a reasonable opportunity to litigate claims in an action in which the person was not a party. See Owens, 54 F.3d at 274 ("A person who was not a party in the state court action did not have an opportunity to litigate its claims. That person must be allowed to bring an action in federal court to attempt to vindicate its perceived rights. . . ."); Roe, 43 F.3d at 580 ("[B]ecause the plaintiffs are not parties to [the state court action], the plaintiffs had no opportunity to raise their constitutional claims in [state court]. . .").

What we have said disposes of Defendant's arguments premised on Anderson v. Colorado, 793 F.2d 262 (10th Cir. 1986). There we noted the distinction drawn in Doe v. Pringle, 550 F.2d at 597, between general challenges to state bar admission rules and claims that a state court unlawfully denied a particular applicant admission. Finding a father's § 1983 suit could not be used to undo a particular Colorado custody decision, we invoked the Doe-Feldman doctrine, affirming dismissal of Anderson's suit. However, no argument was made that Anderson was not a party to the custody suit in question or that he did not have a reasonable opportunity in that proceeding to assert his claims. Thus Anderson was a critically different case and that ruling offers no support for the Defendants here.

Accordingly, the district court erred by dismissing Plaintiff's action under the Rooker-Feldman doctrine.

III

We turn now to alternative grounds which Defendants press for upholding the dismissal of Plaintiff's complaint. In addition to relying on the Rooker-Feldman doctrine, the Defendants also argue that the "Abstention Doctrine" nullifies any potential federal jurisdiction to determine custody of a minor, relying on Ankenbrandt v. Richards, 504 U.S. 689 (1992). See Brief of Appellees at 8-10. Citing a portion of the Ankenbrandt opinion, id. at 703, Defendants point to the Court's statements in In re Burrus, 136 U.S. 586, 594 (1890), on "the whole subject of the domestic relations of husband and wife, parent and child . . ." as belonging to the laws of the States and not to the laws of the United States. Defendants point out that Ankenbrandt noted that this language has been interpreted to apply with equal vigor to diversity jurisdiction cases, although

Burrus technically did not involve construction of the diversity statute. Ankenbrandt at 703. From the language in the cases, Defendants maintain that the domestic relations exception bars the federal courts from determining the custody of a minor. Defendants' argument is made broadly without any distinction between exercising diversity or federal question jurisdiction.[4]

While the domestic relations exception was argued below, App. at 90, neither that exception nor abstention in any context was relied on in the judge's oral or written rulings. Nevertheless we feel that we can and should consider these matters. See Morrow v.Winslow, 94 F.3d 1386, 1391-92 (10th Cir. 1996) (so holding as to abstention); Sanchez v. Pacific Powder Co., 147 F.3d 1097, 1100 (9th Cir. 1998) (so holding for jurisdictional issues).

A

Ankenbrandt explains the historical origin of the domestic relations exception to diversity jurisdiction, a principle which dates to the Supreme Court's 1859 decision in Barber v. Barber, 21 How. at 582 (1859), stating:

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[4] Some district courts in the Second Circuit have applied the domestic relations exception in federal question cases, but other Circuits have held that the exception is limited to diversity suits. See Wright & Miller, Federal Practice and Procedure, § 3609, n.4.2. The parties have not addressed this distinction and we do not feel it advisable or necessary in our disposition of the instant case to do so.

> Although In re Burrus [136 U.S. 586 (1890)] technically did not involve a construction of the diversity statute, as we understand Barber to have done, its statement that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States," id., at 593-594, has been interpreted by the federal courts to apply with equal vigor in suits brought pursuant to diversity jurisdiction.
>
> This application is consistent with Barber's directive to limit federal courts' exercise of diversity jurisdiction over suits for divorce and alimony decrees. See Barber, supra, at 584 . . . We conclude, therefore, that the domestic relations exception, as articulated by this Court since Barber, divests the federal courts of power to issue divorce, alimony, and child custody decrees. Given the long passage of time without any expression of congressional dissatisfaction, we have no trouble today reaffirming the validity of the exception as it pertains to divorce and alimony decrees and child custody orders.

Ankenbrandt, 504 U.S. at 703.

In his complaint Plaintiff Johnson asks that the district court "[i]ssue an immediate injunction commanding Defendants to return Baby Orozco to Plaintiff." App. at 23. The domestic relations exception plainly bars the district court from granting that relief in exercising diversity jurisdiction. However, despite the unavailability of that remedy in exercising diversity jurisdiction, Plaintiff's underlying claims making a general challenge to the constitutionality of the Utah adoption statutory scheme, and alleging a due process violation, must be considered in the context of federal question jurisdiction which is also asserted.

Plaintiff's constitutional claim alleges that Utah's adoption statutes unconstitutionally denied him notice and an opportunity to be heard. That claim does not require the district court to make a child custody determination. In fact, if the federal district court determines that the Utah statutes are unconstitutional, then the parties could return to the state court for new proceedings about custody and the request for adoption. Because Plaintiff's constitutional challenge to the Utah statutes does not require the federal district court to make a custody determination, that claim does not fall within the domestic relations exception even if the exception applies to proceedings involving an exercise of federal question jurisdiction.

Plaintiff's complaint also alleges that Defendants' efforts to remove Baby Orozco from Arizona and to prevent Plaintiff from intervening in the state court action constitute intentional infliction of emotional distress. The Supreme Court in Ankenbrandt made clear that such tort claims do not fall within the domestic relations exception: "[T]he domestic relations exception encompasses only cases involving the issuance of a divorce, alimony, or child custody decree. . . . This lawsuit in no way seeks such a decree; rather, it alleges that respondents Richards and Kesler committed torts against L.R. and S.R., Ankenbrandt's children by Richards. Federal subject-matter jurisdiction pursuant to § 1332 thus is proper in this case." Id.

Accordingly, neither Plaintiff's constitutional claim challenging the Utah adoption laws nor his tort claim fall within the domestic relations exception. These claims should be considered and decided on remand by the district court.

B.

Even though the domestic relations exception does not bar Plaintiff's underlying claims, "the abstention principles developed in Burford v. Sun Oil, 319 U.S. 315 (1943), might be relevant in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody. This would be so when a case presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." Ankenbrandt, 504 U.S. at 705-06 (citations and quotation marks omitted). However, such a case would likely occur when "the suit depended on a determination of the status of the parties." Id.

Plaintiff's constitutional claim for the Utah adoption statutory scheme to be held invalid does not depend on the status of the parties (i.e., the custody determination). Moreover, Plaintiff's constitutional claim does not present "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the results in the case then at bar." Plaintiff's constitutional claim instead requires the district court to determine whether a Utah statute violates Plaintiff's federal constitutional rights. Plaintiff's claim therefore only asks the district court to act within its area of expertise, rather than to invade the province of the State. Accordingly, Burford abstention and related theories do not call for avoiding a decision on the Plaintiff's constitutional claim for invalidation of the Utah Adoption statutes. The constitutional claim should be considered and decided on remand.

Plaintiff's tort claim requires the district court to determine whether Defendants' efforts as alleged to remove Baby Orozco from Arizona and to refuse to inform Plaintiff Johnson about the adoption proceeding amounted to intentional infliction of emotion distress. Like the constitutional claim, the tort claim does not depend on the status of the parties. Moreover, the tort claim does not present "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." Instead, the claim requires a determination whether Defendants' conduct was tortious. See, e.g., Ankenbrandt, 504 U.S. at 706 ("Where, as here, the status of the domestic relationship has been determined as a matter of state law, and in any event has no bearing on the underlying tort alleged, we have no difficulty concluding that Burford abstention is inappropriate in this case."). Accordingly, abstention does not apply to Plaintiff Johnson's tort claim for intentional infliction of emotional distress.

Finally, we must consider another question about the request of Plaintiff Johnson that the district court "[i]ssue an immediate injunction commanding Defendants to return Baby Orozco to Plaintiff." App. at 23. With respect to consideration of that request in the context of exercising diversity jurisdiction, we earlier held that the domestic relations exception bars the district court from granting that relief. In the context of federal question jurisdiction we feel that consideration of this request for an injunctive order for return of Baby Orozco must be deferred until the validity of the Utah adoption statute as applied here is determined by the District Court on remand. If the Utah adoption law and its application here should be held invalid, of course the federal district court should not undertake the making of any custody or adoption ruling. Those matters instead would be within the jurisdiction and expertise of the Utah courts. If the Utah procedure and its application here are held valid, then the existing adoption order would of course not be disturbed.

IV

The district court erred in holding that the Rooker-Feldman doctrine bars Plaintiff's claims and in dismissing Plaintiff Johnson's complaint on that basis. Although the domestic relations exception bars one of Plaintiff's proposed remedies in connection with the exercise of diversity jurisdiction — awarding custody of Baby Orozco to him — Plaintiff's general constitutional challenge to the Utah adoption law and his tort claims do not fall within the domestic relations exception. Moreover, the abstention doctrine should not be applied to Plaintiff's constitutional claims. Accordingly, the district court erred by dismissing Plaintiff's claim seeking a determination of invalidity of the Utah adoption laws. The district court should defer considering Plaintiff's claim asking that the district court award him custody of Baby Orozco until the validity of the adoption procedure is determined on remand.

Accordingly, the decision is affirmed in part, reversed in part, and the case is remanded for further proceedings in accord with this opinion.